LEADING CASES

IN

LAND PURCHASE LAW

JOHN HENRY MAC CARTHY.

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EDITED BY

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PREFACE.

As Land Purchase Court practice is rapidly growing in extent and importance, it may be useful to both branches of the legal profession to have a handy and authentic collection of the principal decided cases on the subject.

I am enabled to supply such a collection by the kindness of several eminent Judges and of the Land Purchase Commissioners in permitting me to use their manuscripts, by the courtesy of the Secretary of the Council of Law Reporting in allowing me to use the head-notes of several reported cases, and by the liberality of the Proprietor and Editor of the *Irish Law Times* in authorising me to include a selection from the Reports supplied to that Journal by Mr. J. W. Brady Murray, B.L.

In order to limit the cost and bulk of the volume, I omit several cases which appertain rather to the general law of Real Property than to Land Purchase Law.

I also omit some cases rendered obsolete by the Purchase of Land (Ireland) Act, 1891.

The cases appear in the order of date.

19 Aylesbury Road, Dublin,
25th March, 1892.

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July 2, 1887.—*Land Purchase Act*, 1885—*Construction of s.* 14—*Sales for gross sum—Addition to advance—Purchase and re-sale of Estates—Practice—Final Schedule of Incumbrances—Priority of owner's costs of sale—Landed Estates Court Act, s.* 78.

The provisions of s. 14 of the Land Purchase Act, 1885, are only applicable in sales of purchase and re-sale by the Land Commission under s. 5, or in case where the Commission order a holding to be re-sold.

Sales of incumbered estates are deemed to be for benefit of parties entitled to fund, and when the procedure is by vesting order the Court will direct the vendor's costs of sale to be placed in priority to incumbrances on final schedule in the absence of special circumstances.

Motion, on behalf of the vendor, that out of the sum of £20,175 4*s.* 11*d.* lodged in the Bank of Ireland to the credit of this matter the Land Commission should pay to the Inland Revenue the stamp duties and registration fees, amounting to £159 2*s.* 6*d.*, payable on the vesting orders to the tenants. Some of the agreements with the tenants provided that the sales should be inclusive of all expenses, but in the majority of cases these words were struck out; and this motion was made with the avowed object of a further application to have the amount of the stamp duties and registration fees added to the tenants' advances in each case under section 14 of the Purchase of Land Act, 1885. The incumbrances exceeded the amount of the proceeds of the present sales. Mr. Saunders, a puisné incumbrancer on the fund, opposed the application.

Mr. Pakenham Law, Q.C., for the vendor.

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Commissioner Lynch:—

As the order to be made on this motion involves the construction to be put upon the 14th section of the Purchase of Land (Ireland) Act, 1885, I think it well that I should state the construction which I am prepared to put upon that section. In my opinion it is only applicable to cases in which the Land Commission purchases estates under the 5th section of the Act for the purpose of re-sale, or to cases where the Commission may order a holding to be re-sold. The 14th section provides that "on every sale when an advance is made by the Land Commission, the Land Commission shall charge the purchaser with one gross sum, which shall include the advance, the stamp duty on the vesting order or conveyance, if any, made by the Land Commission, and the stamp duty and fees payable for registering such vesting order or conveyance." Taking the section by itself, it appears to me to contemplate the case of a sale by the Land Commission, because in no other case does the Commission make a conveyance. But we must read the section in conjunction with the latter part of the preceding section. Section 13 provides that "when, for the purpose of purchasing any estate for re-sale to the tenants thereof, it appears expedient, the Land Commission may purchase any land or hereditament held in connection with such estate or any rent issuing out of it, or may purchase up any right, easement, charge, or incumbrance affecting it." Having thus made provision for what we may purchase in addition to the landlord's estate, the 14th section indicates the method whereby we are to provide for vesting the holdings in the tenants "without loss to the Commission," as directed by the 5th section, but without requiring any immediate cash payment from the tenant purchaser; and this is done by including in the gross sum we charge the purchaser our outlay in stamp duty and registry fees. In the cases of purchases by the Commission the 5th section provides that the Commission is to retain not less than one-fifth of the purchase money to satisfy the purposes of a guarantee deposit, as defined by section 3. We thus have in such cases a fifth of the entire purchase money to answer any default which may arise upon re-sale to any individual purchaser in repayment of the advance we make to him, whether we have purchased up further interests under the 13th section or

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otherwise. I hardly think it necessary to refer to the 3rd section of the Act, which enacts that the guarantee deposit upon a sale from a landlord to a tenant is to be not less than one-fifth of the advance—the advance in such case being the principal sum or price. In this case the guarantee deposits are one-fifth of the advance or price paid over to the owners, and if I were now to proceed to add to the advances sums representing the stamp duty and fees, I would be making advances in excess of the principal sum or price, to secure the repayment of which I am bound to hold a guarantee deposit, being not less than one-fifth of the advance. There is no section analogous to the 14th section in the Act of 1881; but there is in the 36th section of that Act a provision that in fixing purchase moneys and fees the estimate was not to be less than the amount required to defray expenses. The Act of 1885 was framed very hurriedly. Some of the provisions are taken from a Bill which was introduced in 1884, but which provided for county guarantees instead of guarantee deposits; hence arise some of the defects and ambiguities which are apparent in this and the other sections of the Act, but many of which have been remedied in the Act of 1887. Taking, however, the section as it stands, and reading it, as I must, in conjunction with the antecedent sections, I can put no other construction on it than the one I have already indicated. Apart from any question as to construction of the Act, I can see grave complications and difficulties which would arise if this provision were held to be applicable to cases of sales from landlord to tenant. It might result in the Commission having to undertake, in addition to the other duties which it has to perform with a very limited staff, the task of preparing and completing all conveyances and vesting orders. There are other expenses and fees incident to conveyancing besides stamp duty and registry fees, and, in the interest of the public and of the solicitors' profession, I do not think that this would be a desirable mode of procedure at present. In our Rules of December, 1887 (rule 42), we direct that in the cases of vesting orders upon sales between landlord and tenant the solicitor for the owner shall prepare the orders, and our schedule of fees provide for his remuneration, while, under the Act of 1887, section 18, the vendors have been relieved from the costs of pro-

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curing the execution by the tenants of deeds securing the advances which we now do by charging order. On the other hand, in cases of purchases of estates by the Commission it has been pointed out that in some of the agreements in this case (which are all in the old form) the words "inclusive of all expenses" are struck out, while in others they are left in. But it appears to me that if these words were so struck out intentionally, and with the object of charging certain tenants with these expenses while others were to be exempted from them, it is a question between the vendor and the purchaser, with which I have not to deal and which cannot affect the measure of our advances in such cases.

Another point has arisen in this case which does not at all relate to this section, but which I think it right to deal with on this motion—the priority in which the costs of the owner's solicitor should be placed upon the draft schedule of incumbrances. Following the analogy of the Landed Estates Court and the provisions of the 78th section of the Landed Estates Court Act (which enacts that the costs of a petitioner are to be paid in the same priority as his demand, unless the Judge otherwise direct), the Examiner has put the costs here at the foot of the schedules. The sales in vesting order matters in this Court are made upon notice to incumbrancers; the order that such sales be carried out is subsequently made absolute; and the proceedings are to be deemed to be for the benefit of those entitled to the proceeds of the sale. I shall therefore be prepared in this case and in similar cases to direct that the costs be placed in their proper priority as one of the first items to be paid out of the proceeds of the sale. Having done so, I do not think that in this case it would be unreasonable that the solicitor should apply to me under the 51st rule, if he thinks it necessary, for an advance to cover his outlay in stamp duty and registry fees payable on these vestings orders.

I therefore refuse this motion, and I declare the vendor entitled, as part of his costs in the matter, to the sums paid for stamp duty and registry fees, as well as the costs of and incident to the preparation of the vesting orders. If, however, the parties interested in the fund think that the vendor has any personal claim against any of the tenants in respect of their agreements, I shall

make the order, without prejudice to the vendor's rights, against the tenants personally under such agreements, the solicitors, of course, undertaking to give credit for any sums so recovered in their costs.

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I think that, having regard to the peculiarity of this case and the points involved, the owner is entitled to the costs of this application, with counsel, as part of his costs in the matter.

Order accordingly.

Solicitors for owner: *Messrs. Fry & Son.*
Solicitors for Mr. Saunders: *Messrs. S. Gordon & Son.*

In re ESTATE OF JAMES WILLIAM HANRAHAN.

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In re Hanrahan's Estate.

Feb. 2, 1888.—*Land Law (Ireland) Act*, 1887, *sec.* 15 (2)—*Lay tithes held under fee-farm grant—Redemption—Jurisdiction of Land Commission—Price fixed—Payment into Bank of Ireland of Redemption Money.*

The Land Commission has power to order the redemption and fix the price of lay tithes issuing out of lands sold under the Land Purchase Acts, even though such tithes are held under lease or fee-farm grant.

Having regard to the circumstances under which the tithes in this case were payable, the price was fixed at twenty years' purchase of the tithes, less poor rate, taken on the average for the previous five years.

When a lay tithe rent-charge has been ordered to be redeemed, the Court may direct the purchase money to be paid into the Bank of Ireland, and declare the claims of all persons on such tithe rentcharge shall attach to the purchase money (1).

Motion on behalf of the vendor, for an order for the redemption of £13 18*s.* 10*d.*, lay tithe rent-charge issuing out of the lands of Kilmagner, situate in the parish of Castlelyons, Co. Cork, and sold to tenants under the Purchase of Land (Ireland) Acts, 1885–1887, and for an order that the purchase money be paid into the Bank of Ireland. Miss Ryder, the person in receipt of this and the other lay tithes of the parish, held under fee-farm grant from Sir Guy

(1) Now, by sec. 20, Purchase of Land (Ireland) Act, 1891, the Commission has the same powers in respect of the redemption money as are contained in sec. 14, sub-sec. (1), Land Law (Ireland) Act, 1887. See also Rule 68 of the General Rules of Court of the 15th Aug., 1891.—Ed.

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Travers at the rent of £150, and was entitled as to one moiety absolutely, and as to the other as tenant for life with remainder over, and subject to a perpetual annuity of £100 a year to the Vicar of Castlelyons. Mr. Hanrahan, the owner, appeared in person.

Mr. Shekleton, Q.C., for Miss Ryder.

COMMISSIONER LYNCH:—

This case comes before me upon a motion by the owner that a lay tithe-rentcharge of £13 8*s.* 10*d.*, payable out of lands which have been sold to the occupying tenants, shall be redeemed under sub-sec. 2 of sec. 15 of the Land Law (Ireland) Act, 1887, at a price to be fixed by the Land Commission. The lands which have been sold form portion of the townland of Kilmagner, containing 261a. 2r. 39p., situate in the barony of Condons and Clongibbons, and in the parish of Castlelyons and County of Cork. The estate was purchased in the Landed Estates Court in 1860 for £3,000. It was subsequently bought by the predecessor of the present vendor in 1863 for £3,300, and it has now been sold by him to five occupying tenants for £2,297, the tenement valuation being £136 10*s.* When the application came before me on the 16th of January last it appeared from the statement of Mr. Shekleton, who represented Miss Ryder, the person now in receipt of these tithes, that in the year 1788 Robert Travers demised the impropriate tithes of the parish of Castlelyons to Joshua Browne for lives renewable for ever at a rent of £180, late currency, with a pepper-corn renewal fine; that this lease was renewed in 1812; and that in July, 1862, it was converted into a fee-farm grant. In this grant there is a recital of an agreement made in 1838, when the representative of the original lessee applied for an abatement of the rent in proportion to the reduction of the profits arising from the conversion of the tithes under Lord Stanley's Act; and under this agreement the rent was reduced from £166 3*s.* 1*d.*, sterling, to £150. The rent reserved under the fee-farm grant is £166 3*s.* 1*d.* There appears to have been some doubt as to the legal right of the lessee under the original lease to claim any reduction, but the grant contains a covenant for the

acceptance of the reduced rent of £150, which is, in fact, the rent now paid. It further appeared, from the statement of counsel, that Miss Katherine Ryder is now entitled to the tithes of the parish of Castlelyons so granted as to one moiety absolutely, and as to the other moiety for her life, with remainder to Arthur Ryder, but subject to a perpetual annuity of £100 a year, payable, under the will of Lucinda Ryder, to the Vicar of Castlelyons parish. When these facts were opened before me I directed that notice of the application should be served upon the representative of the grantor in the fee-farm grant under which Miss Ryder claims. Notice was therefore served upon George Alexander, the agent to whom the fee-farm rent is paid, and by registered letter upon Sir Guy Clarke Travers, who is represented to be the owner of the rent. On Monday last the case came before me again. No one appeared for Sir Guy Travers; but it was contended by Mr. Shekleton, who represented Miss Ryder, that as the fee-farm rent was a rent issuing out of the tithes and not out of the lands being sold, it was not capable of being apportioned under the powers of apportionment conferred upon us by the 10th section of the Purchase Act of 1885, as extended by sub-section 2 of section 16 of the Act of 1887, and that, therefore, the Land Commission has no power to order the redemption of a portion of the tithes so held under the fee-farm grant, and that even if the Commission were so empowered, it would not be expedient that it should exercise the powers of redemption conferred by sub-section 2 of section 15 of the Act of last session. It appears to me that if I were to yield to this argument the admirable provisions of this section, so far as they related to lay tithes, would be rendered nugatory. A very large portion of the lay tithes are, in fact, held under leases or fee-farm grants; and I am not prepared to assent to the proposition that the existence of these leases and grants can be pleaded in bar of the exercise of our jurisdiction under this section. Apart from the difficulties which have arisen in the case of limited owners who are unable to provide, by way of indemnity, against outgoings of this character, and in the cases of insolvent estates of giving any indemnity, it appears to me that the position of the owners of these lay tithes would not be improved if upon the cases of sales to tenants they were

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compelled to have recourse to each holding for the portion of the tithe which would be recoverable thereout.

I see no difficulty in carrying out the provisions of this section. By the 73rd of our General Rules of the 5th December, 1877, it is provided that, "when the land Commission shall have ordered the redemption of any lay tithe rent-charge the purchase money thereof shall, if the Commissioners think fit, be paid into the Bank of Ireland to such credit as they may direct; and thereupon the Commissioners may, by order, declare that the claims of all persons, whether as owners of or incumbrancers on such tithe rent-charge, shall attach to such purchase money." This appears to me to be a case in which the purchase money should be so dealt with. The tithes, upon the making of our order, will cease to be a charge upon the lands sold; the purchase money will be invested; and the interest will be paid to the person now entitled to the tithes or, for the time being, entitled to the interest. The corpus of the fund will remain in Court to answer the demands of all parties claiming to have an interest in the purchase money which represents the lay tithes so redeemed. When that fund comes to be allocated those interests must be ascertained.

I now come to deal with the question of price. Mr. Shekleton has urged that the price should be 22½ years' purchase of the net tithes, being the rate named in the 32nd section of the Church Act of 1869; while Mr. Hanrahan has contended that, having regard to the rate at which he has sold to his tenants (about 16¾ years upon the tenement valuation), and to the statutable right which exists for the septennial revision of tithes, according to the price of corn, &c., in the district, and to the existing prices of corn in the locality where this estate lies, the price should be fixed at 18 years.

I am of opinion that the rate named in the Church Act (22½ years' purchase) is in excess of the selling value of lay tithes in the open market. Lay tithes, when sold in the Incumbered Estates and Landed Estates Court, did not fetch such rates. The Landed Estates Court judges, when awarding compensation for misstatements as to the liability of lands to tithe rent-charge, usually awarded 18 years' purchase, or sometimes the same rate as that at which the estate was sold. The report of the Royal Commissioners

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on the Act of 1881 and 1885 recommends a reduction in the price of tithe rent-charges as fixed by the Church Act (1). The 15th section of the Land Law (Ireland) Act, 1887, points to a revision of these rates, and therefore, without reference to any decision which the Commissioners may, with the consent of the Treasury, come to as to the price at which tithe rent-charge payable to the Land Commissioners may be redeemed, I am prepared, having regard to all the circumstances of the case, to fix the redemption price of this lay tithe rent-charge at 20 years' purchase upon the tithes, after deducting the poor rate taken on the average of the last five years. As, however, I am not satisfied that adequate notice of this motion has been given to Sir Guy Clarke Travers or the person representing the grantor's interest in the fee-farm grant, and this being the first order which has been made under this section, I direct that a conditional order do issue for the redemption of those tithes at the rate I have named, and that such conditional order be served upon the owner of the grantor's interest under the fee-farm grant and upon Mr. Shekleton's client. Cause in twenty days.

Order accordingly.

Solicitors for owner: *Messrs. Hanrahan & Co.*
Solicitor for Miss Ryder: *Mr. Francis Hodder.*

(1) The recommendation referred to is to be found in paragraph No. 60 of the Report of the Royal Commission known as "Lord Cooper's Commission." It is as follows :—" We recommend that all quit and crown rents and tithe rent-charges shall be redeemed; . . . and if redeemed, that the rate of purchase required for that purpose should be reduced."—Report, &c., p. 17.

Lynch, C. *In re* THE ESTATE OF GEORGE QUIN AND OTHERS.

1888. March 2.

In re ESTATE OF QUIN AND OTHERS.

March 2, 1888.—*Specific performance—Land Law (Ireland) Act*, 1887, *Sec.* 22—*Contract for sale—Advance provisionally sanctioned—Death of purchasing tenant—Informal will—Refusal of devisees in occupation of holding to carry out contract—Non-interference of heir-at-law.*

A tenant entered into an agreement with the vendors for the purchase of his holding, and an advance was provisionally sanctioned for that purpose by the Land Commission. Before the conveyance was executed the tenant died, leaving by his will, which was informally executed, his property to his wife, with remainder on her death to two younger sons. The devisees remained in occupation of the holding, but refused to carry out the contract for sale upon the terms agreed upon. No probate to the will was taken out, and the heir-at-law refused to interfere.

On a motion for a decree of specific performance against the devisees and the heir-at-law, or some or one of them, the Court, under the circumstances, refused to make any rule.

THE facts are fully set forth in the judgment.

COMMISSIONER LYNCH:—

In this case Dominick Forde was a tenant from year to year under the owners in this matter. His holding consisted of 47 acres, part of the lands of Pallas. His rent was £20. On the 18th November, 1886, he signed an agreement to purchase his holding for £400, and applied to the Land Commission for an advance of the entire purchase money, the vendors undertaking to provide the guarantee deposit, and it being agreed that the sale was to be carried out by conveyance. The advance was provisionally sanctioned by the Commissioners on the 21st December, 1886. It appears from the affidavit of Mr. Franks, one of the vendors, that the tenant then owed over three years' rent, which was to be released by the conveyance. The vendors appear to have had some difficulties as to title and annuities to which the estate was subject, and it was not till November, 1887, that the conveyance was executed by the vendors and two annuitants, who joined for the purpose of releasing the holding from their annuities. The conveyance was registered on the 25th November, 1887. It was then lodged with the Commission, in order that the advance might be made, and the usual charging order securing the advance issued, under the 18th Section of the Act of 1887. Previous to the passing of this Act

the tenant-purchaser would have been a necessary executing party to the conveyance, and, in fact, by his agreement he undertook to execute to the Commission the necessary deed to secure the repayment of the advance.

Before making the charging order evidence must be given by affidavit that the tenant-purchaser, a party to, but not executing, the deed, is alive. It was then ascertained that Dominick Forde had died about the 27th June, 1887, five months before the execution of the conveyance by the vendors. I collect from the affidavit of Mr. Franks that about ten days previous to his death he executed, as a marksman, a will which is not dated, and which, though witnessed by two witnesses, does not contain the usual attestation clause. By this will he bequeaths "to his wife his land and property whilst she lives, and after her death to be divided with his sons Thomas and James;" to three of his children he leaves a shilling each, one of them, Michael, being his heir-at-law. The witnesses informed the solicitor that they saw the testator affix his mark; that they signed it in his presence; that they did not remember if it had been read to him; and that he was "silly" when he signed it. One of the witnesses declined to say that the deceased approved of it, but said "he asked him if he was satisfied, and he shook his head in a manner which made him understand he was satisfied." A declaration of these facts was prepared, but it is stated that Anne Forde, the widow, and Thomas Forde would not allow the witness to make it. They are in occupation of the holding, but said they would not carry out the purchase on the terms agreed upon unless a considerably less price was accepted; and Anne Forde on the 12th December wrote a letter in which she says, "There is no use in my signing papers; I will accept only the same terms as the other tenants are looking for."

Application appears to have then been made to Michael Forde, the heir-at-law, who resides in Dublin, to ascertain if he had any intention of claiming the farm as heir-at-law, or if he consented to the mother and brothers taking the farm under the informally-executed will. He informed the solicitor that he would not interfere in the matter, but would leave it to his mother, as she knew more about it than he did. It was explained to him that if the

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will was invalid he was entitled to the property, but he said he "did not care."

It is stated that Anne Forde and her son Thomas do not intend to prove the will. In this state of facts a notice of motion was served by the solicitor for the vendors for a decree for specific performance of the agreement dated 16th November, 1886, as against "Anne Forde, Thomas Forde, and James Forde, as devisees under the will, and also against Michael Forde as heir-at-law, or some or one of them." This application was made under the 22nd Section of the Act of 1887. There was no appearance for the parties served, but Anne Forde wrote a letter dated 21st February, in reply to the notice, making an offer to give 20 years' purchase at 20 per cent. reduction.

While I have no doubt that the contract was a valid and binding one upon Dominick Forde, and capable of enforcement against him, and that the holding is security for the advance applied for, and while I think it is very possible that the persons entitled to the interest of Dominick Forde in these lands are merely endeavouring to extract more favourable terms from the vendors as to the price, by throwing obstacles in the way of the completion of the sale, I am of opinion that the vendors are not, at present at all events, in a position to ask me for a decree for specific performance. The conveyance executed after the death of the tenant is worthless. Our duty is to advance the money and pay it over to the vendors when they produce to us a conveyance duly executed to the purchaser, or the person now legally entitled to such conveyance, so that we may charge the holding so conveyed with the advance. These conditions are not fulfilled. It does not appear to me that I could on this motion and under existing circumstances make a decree in the terms of the notice. Let me assume that this was a case where the tenant left no assets—that the farm was, in fact, "damnosa hereditas"—would the vendors in such a case be in a position to ask for a decree for specific performance against devisees who did not enter into possession of the assets and declined to undertake the burden of the contract, or against the heir-at law, who repudiated an estate which was valueless? In my opinion they would not. In this case there is no evidence that the tenant left any assets other than this farm. No attempt

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has been made to prove the will, of the existence of which the vendors became aware only in November last. I offer no opinion as to the validity of the will, or as to what further steps the vendors should take to enforce their rights either for a specific performance or for damages for non-performance. It may be if the will is not proved by the parties that the vendors can proceed to obtain a limited grant to "substantiate proceedings" from the Court of Probate.

Having regard, however, to all the circumstances of this case and the complications which have arisen, I shall make no rule on this motion, without prejudice to any further application that the vendors may be advised to make in the matter.

Solicitor for the vendors: *Mr. J. H. Franks.*

In re ESTATE OF EDWARD O'KELLY.

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In re O'KELLY'S ESTATE.

(23 Ir. L. T. Rep. 86.)

Nov. 27, 1888.—*Landlord and tenant—Advances to tenants for the purchase of their holdings—Tenant in occupation—Sub-letting—Tenants for temporary convenience pending sales in Land Judges' Court—Security for advances—Cause shown against making advances—Land Law (Ireland) Act*, 1881, *secs.* 24 *and* 57, *and Purchase of Land Act*, 1885, *sec.* 2 (*a*).

Where lands for sale in Land Judges' Court had been let for temporary convenience, and the tenants applied for advances to enable them to purchase their holdings, the Land Commission agreed to make the advances; but the owner in the Land Judges' matter having intervened, and it appearing that the lands were sub-let in grazing or conacre, and that the tenants had not sufficient capital or stock to work their farms, the Court refused to make the advances as not being "satisfied with the security" within the meaning of the 24th section of the Land Law Act, 1881, and the 2nd section of the Purchase of Land Act, 1885.

THE circumstances of the case are fully stated in the judgment.

Mr. Meldon, Q.C., for the tenants.

COMMISSIONER MACCARTHY:—

This matter comes before me on the motion of Mr. Meldon, Q.C., to advance the sums of £4,260, £4,151, and £2,831 to Messrs. James, Michael, and Thomas Browne respectively, for the purchase of their holdings on the lands of Cooloo, in the Co.

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of Galway. These lands, with other lands not the subject of this motion, formerly belonged to a well-known and respected Galway gentleman, Mr. Edward Browne, of Cooloo. He charged them with a jointure of £400 a year, now payable, to his widow, and with a mortgage for £4,000, still outstanding. In 1871 Mr. Michael O'Kelly succeeded to the ownership of Cooloo, as devisee under Mr. Browne's will. During his ownership he very considerably added to the incumbrances, and appears to have got into embarrassed circumstances. In 1882 he divided his demesne lands of Cooloo into three lots, and executed three leases at substantial, but apparently not excessive rents, to his brother, Mr. Edward O'Kelly. In the following year the latter gentleman assigned these leases to his wife, Mrs. Lizzie O'Kelly. Proceedings were taken in the Landed Estates Court, at suit of the mortgagees, for £4,000. Pending these proceedings Mr. Michael O'Kelly died, having by his will devised this estate to Mr. Edward O'Kelly, subject to the encumbrances and to the leases I have mentioned. Mr. Edward O'Kelly thus became, in respect to the three holdings in question, landlord of his own wife. In this state of facts Mrs. Lizzie O'Kelly applied to us for advances to enable her to purchase these holdings; and it was explained that, though her husband was technically owner, the money would really go to the encumbrancers on his estate. Nevertheless, for obvious reasons, we deemed it our duty to refuse the applications. The Act is certainly not intended to enable a gentleman to "root" his wife as peasant proprietor in the soil. Meantime a receiver had been appointed, and Mrs. Lizzie O'Kelly had fallen into heavy arrears of rent. Being unable to pay she was evicted, and the leases thus vested in her were determined. The three lots were advertised for letting. The three Messrs. Browne, who are relatives of the former proprietor, Mr. Edward Browne, put in proposals. These proposals were accepted, and the usual leases for one year pending a sale were made to them. I believe that they have since paid their rents with reasonable regularity. In April, 1888, all the tenants on the estate, including the three gentlemen in question, applied to us for advances to enable them to purchase their holdings in the Landed Estates Court. The usual inspections were directed. The reports as to the value of the lands were satisfac-

tory. The advances were provisionally sanctioned. The rental was settled in the Landed Estates Court. The applicants were declared purchasers of their holdings. Some delay occurred in lodging the Order with us on account of difficult negotiations with encumbrancers as to providing the guarantee deposits and satisfying the claims of the jointress. But in August last these difficulties were overcome, and the necessary documents were lodged with us by Mr. Robinson, who has carriage of the matter in the Land Judges' Court. At this stage Mr. Edward O'Kelly, who, as it is stated, had not raised any objection in the Land Judges' Court, intervened, and filed in our Court an affidavit objecting to the advances being made on the grounds therein set forth. It is obvious that this was a very inconvenient course of procedure, and not fair to either of the tribunals concerned. Moreover, it appears by the evidence that Mr. Edward O'Kelly has really no beneficial interest in the lands, which are mortgaged beyond their value, and that the guarantee deposits in which he claimed to be interested are really provided out of moneys which would come to the encumbrancers. A question was raised by Mr. Meldon on behalf of the applicants as to whether, in this state of facts, Mr. O'Kelly had any right to be heard. Considering, however, that he is, technically at least, owner of the estate, he is, I think, "legitimus contradictor," and entitled to have his objections considered on their merits. Four answering affidavits have been filed, and ably argued by Mr. Meldon.

The first of the specified objections is that the lands are sub-let in grazing and con-acre. This fact is admitted, but it is explained that this mode of dealing with the lands was caused by the depression in the cattle trade, and that under the Land Law (Ireland) Act, 1881, a tenant is to be deemed in occupation of his holding even though he has sub-let it for grazing or in con-acre. The explanation is reasonable and the statement of the law is accurate. Nevertheless, I think it may be questioned whether it is a wise exercise of discretion to advance State funds to tenants who are thus only in technical occupation, who in substance are middlemen, and who must depend for repayment of the advances on the precarious resources of agistment and con-acre sub-lettings.

Another of Mr. O'Kelly's objections is that the applicants have

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become tenants only for the purposes of purchase. I find nothing to support this objection. Even if the facts were as alleged, the applicants would still be within their rights. Nevertheless, it cannot be denied that there is a distinction between ordinary tenants, most of whose predecessors have been in possession of their holdings for generations, and tenants who have merely been constituted for temporary convenience pending a sale in the Landed Estates Court.

The most important objection remains to be considered. It is that the tenants have neither stock nor capital to work their farms. It appears by the evidence that one of them at least is entitled to a property of £500 a year and to an annuity of £50 a year. But the property is heavily mortgaged, and is the subject of proceedings for sale in the Landed Estates Court. It is doubtful, therefore, whether it will supply funds immediately available for purchase of stock. The three brothers will be entitled to substantial property on the death of their mother, Mrs. Julia Browne. This lady in her affidavit states that she is in possession of considerable resources in landed estates and in the Government funds. With these important qualifications, however, the statements of Mr. Edward O'Kelly appear to be substantially true. The applicants have no stock, and they do not allege that they have any capital to buy stock or otherwise to work the farms. I suggested that Mrs. Julia Browne, who appears to be a lady in good circumstances, should remedy this deficiency by supplying her sons with stock or capital to work the farms. This suggestion, however, was not deemed practicable, and I was called upon by the learned counsel for the applicants to deal with the case as presented to me.

Thus presented, I regret that I must refuse to advance over eleven thousand pounds of public money to three young gentlemen whose tenancies were created for temporary convenience, who have their lands sub-let for grazing and con-acre, and who, according to the evidence, have neither stock nor capital to work their farms.

Order accordingly.

Solicitors for Messrs. Browne: *Messrs. Meldon & Co.*
Solicitors having carriage: *Messrs. A. Robinson & Son.*
Solicitors for Mrs. H. Browne: *Messrs. Carson & Mecredy.*
Solicitors for the vendors: *Messrs. G. D. Fottrell & Sons.*

In re ESTATE OF PENTLAND.

(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY, and NAISH, LL.J.)

(22 Ir. L. T. Rep. 81.)

November 12 *and* 13, 1888.—*Land Law Act*, 1887, *s.* 16—*Apportionment and redemption of fee-farm rents—Jurisdiction of Commission—Order for redemption of entire rent where part only of lands subject thereto sold—Landed Estates Court Act, s.* 72—*Purchase of Land Act*, 1885.

The Land Commission has jurisdiction to order the redemption of an entire fee-farm rent, with or without a previous apportionment, though part only of the lands subject to the rent has been sold under the Land Purchase Acts. To order the redemption is in the discretion of the Commission, but without strong reason the Court will not compel redemption of a fee-farm rent on unsold part of lands against the wish of the owner of such fee-farm rent.

APPEAL on behalf of Mr. de Bell Ball, owner of a fee-farm rent, from an order for the redemption of the whole fee-farm rent where part only of the lands subject to such rent had been sold.

Mr. Bewley, Q.C., and *Mr. Ball*, for Mr. Ball, the owner of the fee-farm rent:—

The lands subject to the fee-farm rent consist of 146a. 2r. 15p. statute measure. Two tenants have purchased part; one of them 28a. 2r. 10p., and the other 28a. 1r. 26p., the part sold being 56a. 3r. 36p., and the part unsold 89a. 2r. 19p. All that the 16th sec. of the Land Purchase Act intended to do was to enable a rent to be redeemed without the necessity for apportionment. The 16th sec. of the Act of 1887 (50 & 51 Vic., c. 33), sub-sec. 3, is as follows:—"The Land Commission shall, on the application of the person entitled to a part of an annuity, rentcharge, or rent, which part shall have been apportioned by them upon lands sold, and may, if they think it expedient, without such application, order the redemption of such annuity, rent-charge, or rent, or of an apportioned part thereof; and may, notwithstanding the fact that no apportionment has been made, order the redemption of any annuity, rent-charge, or rent affecting land sold, at a price to be fixed by agreement between the parties, or to be determined by the Land Commission, if the parties consent that the Land Com-

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mission shall determine it, or if they do not consent, then to be settled by arbitration," &c. The second sub-section of section 16 confers on the Land Commission the power of apportionment, given by the 72nd section of the Landed Estates Court Act as extended by section 10 of the Purchase of Land Act, 1885. The 10th section of that Act enacts that the word "rent" in the 72nd section of the Landed Estates Court Act shall include a fee-farm rent. This was rendered necessary by the decision in *In re Casson*(1) where it was held that the 72nd section did not apply to a fee-farm rent. Under the Landed Estates Court Act there was no power to redeem except by consent. The 68th section of that Act deals with redemption, and the 72nd with apportionment. The 27 & 28 Vic., c. 38, deals with the redemption of chief rents and limited owners, but it was still a matter of agreement. The 15th section of the Act of 1887 deals only with apportionment and redemption of Crown lands. The Land Commission may order the redemption of any rent "affecting lands sold." It is as to the part not sold that we object to this Order. The section applies to two cases—where part of the lands is taken and where the whole is taken. The Commission may redeem the apportioned part. The Land Commission held that they could buy up the part not sold. We do not object to apportionment, but to the compulsory sale of the part not sold. Assuming that there was jurisdiction to make the order, we say that the Commissioner wrongly exercised his discretion. Here only one-third of the lands subject to the fee-farm rent had been sold to tenants; the rest was in the occupation of Mr. Pentland, the middleman. There was no evidence before the Commissioner that any further sales were contemplated. Mr. Barlee's affidavit was the only evidence before the Commissioner, and there was in it no statement of any intention to sell. The landlord's property should not be taken from him against his will.

Mr. Bell, for the respondent:—

£1,130 is the purchase-money for 56 acres. As regards the question of hardship to Ball, what about the hardship to Pentland, if there is to be an apportionment made every time a tenant wants to buy?

(1) 9 Ir. Jur. N. S. 92.

Mr. Bewley, Q.C., in reply:—

Only two tenants of the lands in question have bought. The Act is one to facilitate sales to tenants. Is it to be said that on a large estate where a small lot is to be sold that an enormous fee-farm rent must first be redeemed? If so, anyone holding a fee-farm rent could obstruct the sale.

LORD ASHBOURNE, C.:—

The Act under which this question arises is one for facilitating sales to tenants. In this case there was a fee-farm grant, dated 29th March, 1852, reserving a fee-farm rent of £24 13s., which the owner of the lands now seeks to redeem. The acreage of the lands out of which the rent-charge issues is 146a. 2r. 15p., of which 56a. 2r. 19p. has been sold to tenants, so that the part sold amounted to about one-third of the whole. It was easy to apportion the rent, and the part sold could then be made free. The Commission has jurisdiction to compel the redemption of the whole, and the Commissioner was therefore bound to exercise his discretion. It appeared that the examiner of title said that it would be simpler to buy up the rent; but this was a mere office suggestion. In the judgment under review Mr. Commissioner MacCarthy says:—"The next question I have to consider is—Ought I to exercise the power in this case? I ought not to do so if it would be inequitable towards any one concerned. Thus if the immediate owner"—that is, the grantee—"objected to have the whole head-rent redeemed, when for the purpose of sale it was necessary to redeem only part of it, his objection would be entitled to serious consideration. But in this case it is the immediate owner himself who asks me to order the redemption of the whole out of the purchase-money of part." Then with reference to the head landlord—*i.e.*, the owner of the fee-farm rent—the Commissioner goes on to say:—"Again, if there was any reason to fear that the head landlord would not receive a fair equivalent for his rent, it would not be equitable to order its redemption at all; but there is no such reason in this case." Again:—"I think it is clear that the same force does not attach to the contention of a head landlord who says in effect, 'Divide my rent into fragments if you will, but do not pay me off altogether.'" Mr. Commissioner

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MacCarthy suggested what might have been a valid reason for ordering the redemption of the whole, when he said that the vendor contemplated sales of the remainder of the lands. That would have been a very good reason; but there is no evidence of it. Again, if it were shown that apportionment would be attended with great expense, or that there would be but a small balance after apportionment, these would be good reasons for ordering redemption. But this is not a case of a fragment. If we are to divide the rent in proportion to the lands sold and unsold the result would be that the charge on the lands sold would be about £8, and on the unsold lands £18. Here the grantor says, "I don't want a fair equivalent for the rent, I want my property. I like it. I desire to keep it." What public advantage is to be gained by ordering the redemption of the whole? It will not facilitate sales to tenants. The unsold lands are in the occupation of the grantee. Without a strong, clear, good reason we will not compel redemption against the wish of the owner of the rent-charge; we will not expropriate him out of lands not sold.

FITZGIBBON, L.J.:—

I have no doubt that the Land Commission has jurisdiction to order redemption of an entire rent where part only of the lands subject to it has been sold. The 3rd sub-section of section 16 of the Act of 1887, which gives this jurisdiction, provides for two cases—first, where there has been an apportionment; second, where there has been no apportionment. Some confusion is caused by the construction of the sub-section, which has one nominative case and two verbs. The Commission may order a sale before apportionment and without apportionment. There has been no apportionment in the present case. If the facts stated in the judgment existed in the case—if I saw any reason to believe that the unsold lands were likely to be brought within the Act, I would order redemption. I prefer to use the terms landlord, middleman, and tenant. I do not think that the Act should be used by a middleman in occupation to buy out a rent-charge, nor do I think that the Act is meant for tenancies made after the passing of the Act, and created for the purpose of effecting sales with public money.

BARRY, L.J.:—

I concur. The Commissioner had jurisdiction to make the order. No doubt should be cast on the jurisdiction. It appears that Mr. Pentland, the middleman, is in the actual occupation of the unsold lands. The Commissioner was evidently misled in the exercise of his discretion by the statement that it was intended to sell the rest of the lands.

NAISH, L.J.:—

I agree. I entertain no doubt that under the 3rd sub-section the Land Commission can buy up head rents where part only of the lands subject to them have been sold, even against the will and without the consent of the owner. They have the fullest possible powers. When the question arises whether a rent shall be redeemed, it is not the mere wish of the vendor, or the mere wish of the middleman that is to be considered, but whether it is expedient for the sale of holdings to tenants. Where there is no probability of the remainder of the lands being sold and the owner of the fee-farm rent does not wish to sell it, the Land Commission should not force him to sell.

ASHBOURNE, C.:—

We will make no order as to costs. It was open to Mr. Ball to make an affidavit on the hearing before the Land Commissioner that the unsold lands were in Mr. Pentland's possession, and therefore not within the Act. Mr. Ball allowed judgment to be given without this evidence (1).

Solicitors for the appellant: *Messrs. Hone & Falkiner.*

Solicitors for the respondent: *Messrs. A. Barlee & Greer.*

(1) No such evidence had been given. The Commissioner was left under the impression that all the lands were in the occupation of tenants, and that sales to all the tenants were intended. His decision was expressly based on this supposition.—ED.

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1888.
Dec. 6.

(23 Ir. L. T. Rep. 87.)

In re ESTATE OF WATSON & ANOTHER.

Dec. 6, 1888.—*Redemption of impropriate tithe rentcharges—Ecclesiastical and impropriate tithe rent-charges—Power of Commission to order redemption of impropriate tithe rent-charge—Price fixed—Land Law Act*, 1887, *s.* 15 (2).

Where lands have been sold under the Land Purchase Acts the Commission has power to order the redemption of impropriate tithe rent-charges issuing out of the lands, and will exercise the power in preference to proceeding by way of indemnity. Usual price fixed, 20 years' purchase of the tithes, less the average poor rates for five years.

THE facts of this case are fully set forth in the judgment.

COMMISSIONER MACCARTHY:—

A question has been raised in this case respecting the power of the Land Commission to order the redemption of lay or impropriate tithe rent-charges. Mr. Fottrell, on behalf of the vendors, moves for an order for the redemption of certain lay tithes charged upon lands in the County of Roscommon now being sold to the tenants under the provisions of the Purchase of Land (Ireland) Act, 1885. These lay tithes are payable to the Incorporated Society for Promoting Protestant Schools in Ireland. Mr. Dix, on behalf of the society, resists the motion, explaining that, although the amount of the tithe in question was small, his clients, being largely interested in similar tithes, had instructed him to object to the proposed order for redemption on the grounds that the Land Commission had no power to make such order. The clause under which Mr. Fottrell moves is the 2nd sub-section of section 15 of the Land Law (Ireland) Act, 1887. It is as follows:—"The Land Commission may, if they think it expedient, order the redemption of any Crown rent, quit rent, or tithe rentcharge, or any apportioned part thereof, at a price to be fixed by the Land Commission." Mr. Dix's contention is that the words "tithe rent-charge" in this sub-section apply only to ecclesiastical tithe rent-charge, because no provision is made therein for the consent of the lay impropriator, whereas such consent is carefully provided in respect of all the other charges

specified in the section. *Prima facie*, at least, the words "tithe rent-charge" are large enough to include lay tithe rent-charge, which is only a particular kind of tithe rent-charge. This view is strengthened by the use of the word "any." It would be difficult to hold that the power to order the redemption of "any" tithe rent-charge does not include the power to order the redemption of a particular kind of tithe rent-charge, and thus to introduce an exception which the legislature has not made. Tithes were originally of one kind, and there was no distinction between ecclesiastical and lay tithes; or rather all were ecclesiastical. In process of time such tithes were, in a vast number of cases in Ireland, granted to monasteries on condition that the monks provided a fit priest to perform the parochial duties. This priest was usually a member of the monastic community deputed for this purpose. Hence he was called the vicar. Afterwards by several statutes it was provided that the vicar should be a secular priest, and the monastic community should allocate for his support such portion of the tithes as the bishop should deem sufficient. The part so allocated came to be called vicarial or ecclesiastical tithes, as appertaining to the vicar or the church, the remaining tithes continuing to be vested in the monastery. When the monasteries were dissolved the vicarial or ecclesiastical portion of the tithes remained vested in the vicar, and so continued after the change in religion; but the portion which had been retained for support of the monasteries became vested in the Crown, which subsequently conveyed them to various lay persons. Hence arose the distinction between ecclesiastical and lay tithes. But though the tithes were applicable to different purposes, both continued to be tithes with like incidents and like means of recovery. Both classes continued to be paid in kind until 1823, when by the 4th George IV. (known as Goulbourne's Act) facilities were given for commuting both into money payments for limited periods. These permissive and temporary compositions continued until 1832, when by the 2nd and 3rd Wm. IV., c. 119 (known as Lord Stanley's Act), compositions were made compulsory and universal. Thus they remained until 1838, when by the 1st and 2nd Victoria, c. 109, being the statute now in force, all such compositions were abolished and certain rent-charges were substituted therefor. In these several statutes

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there is no trace of any distinction between ecclesiastical and lay tithes, or of the application of any different rule in respect of them. It seems impossible to institute a distinction which has not been made by any statute, ancient or modern. There is, indeed, one distinction made by the statute now under consideration, but it is a distinction which tells against Mr. Dix's argument. The distinction is this; that while by the 2nd sub-section a general power is given to order the redemption of any tithe rent-charge, it is provided by the 3rd sub-section that in respect to a particular class of tithe rent-charge—viz., the tithe rent-charge "payable to the Land Commission"—the consent of the Treasury is requisite. It seems clear that sub-section 2 was intended to apply to all tithe rent-charges, and that sub-section 3 is intended to make a special exception in respect of one kind of tithe rent-charge—viz, that which is "payable to the Land Commission"—*i.e.*, the ecclesiastical tithe rent-charge, which under the operation of the Church Act and the Land Law (Ireland) Act, 1881, has become vested in the Land Commission, and respecting which, being public money, it is usual that the statute should require the consent of the Treasury. Similar consents are required in cases of other public departments. The construction contended for by Mr. Dix would necessitate the supposition that the legislature used the express words "payable to the Land Commission" without object; that such words do not require consideration; and that the general words "any tithe rent-charge" used in sub-sec. 2 exclude lay-tithe rent-charge, although the section is silent as to any such exception. It might be contended that tithe rent-charges of whatever kind are included in the special provision as to the redemption of rent-charges contained in the 16th section; especially as Lord Selborne, in the well-known case of the Irish Land Commission *v.* Grant (1), heard before the House of Lords in November, 1884, held that "tithe rent-charge" is a "rent-charge" in the proper and legal sense of that word. But this construction is negatived by the specific description, in the 15th section, of the rent-charge with which it is conversant as "tithe" rent-charge, thus showing that it was intended to deal with this class of rent-charge specifically, and thus exclude

(1) 11 L. R. I. 430.

it from the operation of the 16th section. Indeed, if Mr. Dix's contentions were well founded, lay-tithe rent-charge would be excluded from the operation of both sections, and would be the only charge for the redemption, of which no statutory provision would have been made by the Land Law (Ireland) Act, 1887. If this were so we would arrive at the extraordinary result that while all other incumbrances on lands sold under the Land Purchase Acts would have been cleared away, our old friend the Lay Impropriator would still flourish, to the detriment of the new proprietors, of the State security, and of the public interest. It is not likely that this was the intention of the legislature. It is plain that no such intention is expressed in the Act. The amount at issue is small in this case, but, as Mr. Dix properly states, he disputes it on principle. On principle, therefore, it must be decided. In other cases the amount of lay tithes charged on lands proposed to be sold to tenants is very considerable. Thus, in a recent case in the County of Cork, the lay tithe amounted to £180 a year, the burden of which it was proposed to distribute amongst the new proprietors. Of course this was not permitted; redemption was ordered, and the contracts re-settled on the basis of such redemption. The clearing off of such charge is of primary importance for the judicious administration of the Land Purchase Acts. Before we obtained statutory powers enabling us to deal with them they were either assented to at the urgent request of the parties, or dealt with by way of indemnity. But it is evident that the method of indemnity is attended with grave risks and inconveniences. To obviate these disadvantages the legislature in 1887 gave the statutory powers now under consideration. These statutory powers were given to be used, not to be neglected or set aside. The usual order for redemption must therefore be made, and the price fixed at 20 years' purchase on the nett tithe after deducting the average poor rate for the last preceding five years.

Order accordingly.

Solicitors for the owners: *Messrs. Fottrell & Son.*
Solicitors for the impropriators: *Messrs. Dix & Son.*

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In re ESTATE OF THE MARQUIS OF WATERFORD.

1889. March 29.

In re ESTATE OF MARQUIS OF WATERFORD.

March 29, 1889.—*Land Law (Ireland) Act*, 1887, *Sec.* 16, *ss.* 3—*Redemption of rent-charge—Consent to redemption price being determined by Commission—Separate credit—Practice.*

The redemption price will not be fixed at such a sum as would, if invested in Government Stock, produce the same income as the rent-charge. Neither will it be fixed at the same rate as that for which the lands are sold. Each case must be decided on its own facts. The redemption money will be placed to a separate credit, and the parties entitled to it must prove their title thereto.

APPLICATION to determine the redemption price of a rent-charge of £41 15*s.* 8*d.* created by deed of 3rd July, 1861, and payable out of the lands of Carrickavantry South, for a term of 500 years from 25th March, 1759.

The facts are as follows:—The townland of Carrickavantry South forms portion of the estate of the Marquis of Waterford, and was purchased in the Landed Estates Court by his predecessor for £2,450 in July, 1861, in the Matter of the Estate of William Scully, owner, Daniel Carrigan, petitioner. The townland contains 231a. 1r. 29p., the tenement valuation being £128 15*s.*, the present gross annual rental being £149 18*s.* 8*d.*, which at the time of the sale in 1861 was £159 17*s.* 8*d.* A rent-charge of £41 15*s.* 8*d.* was paid out of the lands by the former owners, and one of the conditions of sale on the rental was that the purchaser should execute a deed of rent-charge to the parties in whom the same was then vested. On the 3rd July, 1861, the then Marquis of Waterford executed a deed of rent-charge to Mary Mulcahy, Ellen Davis, Mary Bourke, Bridget Keeffe, Anastasia Heneberry, and Catherine Keeffe, members of the Presentation Convent in Clonmel, in pursuance of the conditions on the rental. The rent-charge is now vested in Margaret O'Donoghoe, Mary Stone, Honoria Carew, Margaret Bourke, Mary Cody, and Mary Keating, while the estate has become vested in the present Marquis of Waterford, who sold the entire townland to the occupying tenants under the Purchase Act for £2,684. For the purpose of redeeming this rent-charge a consent was entered into between the parties that the redemption price

should be determined by the Land Commission, in accordance with sec. 16, sub s. (3), Land Law (Ireland) Act, 1887.

Mr. John B. Murphy, Q.C., for the owner of the head-rent.
Mr. Tweedy, solicitor, for the vendor.

MR. COMMISSIONER LYNCH [having stated the facts as already given]:—

The motion now before me is made under the 16th section of the Land Law (Ireland) Act, 1887, which provides (sub-s. 3) that the Land Commission may, if they think it expedient, order the redemption of any annuity, rent-charge, or rent, notwithstanding that no apportionment has been made. The parties have entered into a consent, dated 9th March, that this rent-charge is to be redeemed, and by this consent it is provided, in the words of sub-sec. 3, that the price shall be determined by the Land Commission.

When this motion was before me last Monday, Mr. Murphy, Q.C., who appeared for the parties entitled to this rent-charge, contended that the price should be fixed at such a sum as would, if invested in Government Stock or preference stock, produce the same income as the rent-charge, and that this being in the nature of a compulsory redemption, the maximum price should be fixed. Mr. Tweedy, on the other hand, as representing the landlord, suggested that the price should be fixed at 20 years, being about two years in excess of the price at which these lands have been sold to the tenants. I cannot yield to either suggestion. In these days when the value of money is so much reduced, and the difficulty of obtaining a reasonably high rate of interest in these securities is so great, it would take a very large sum indeed to produce this income, and such a sum which, in my opinion, a rent-charge of this character would not produce if sold in the open market. Though there is no doubt that this rent-charge may be described as a well-secured rent-charge, for, however great have been the variations in the rents of land in recent years, I cannot foresee any event which would materially affect this security, yet if this property were not in the hands of Lord Waterford, the rent-charge might not be paid with such punctuality, and there is no doubt that other securities present advantages which are not measurable

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merely by the income they return. But even if I were to consider only the rate at which the capital could be now invested, I must remember that if paid out the parties entitled are not limited to Government Stocks or preference securities, but can re-invest on mortgage.

I am, however, of opinion that 20 years' purchase, as suggested by Mr. Tweedy, would be too low a rate to fix for redemption. We have fixed 20 years as the price of lay tithes, which, having regard to their liability to variation, their character and amounts, cannot be regarded as desirable an investment as a rent-charge of this amount.

Lord Waterford has, it is true, sold these lands at moderate rates, but I cannot measure the redemption value of this rent-charge solely having regard to that standard. Head-rents have been redeemed in this country and the prices have ranged from 25 years down, and I am aware of a case where a higher rate was fixed upon arbitration.

Having given the case my best consideration, I am of opinion that the redemption price of this rent-charge should be £950, and I accordingly fix it at that sum, which, when the sales are completed, will be placed to a separate credit, and the solicitor for these ladies will have no difficulty in obtaining an order for payment of the amount (1). They appear to claim under a conveyance of 12th May, 1886, from the survivor of the grantees in the deed of 1861, and evidence must be given to the Examiner as to the devolution, and he will direct the necessary searches.

The parties are entitled to their costs of this motion with counsel to be paid by the owner; they must bear their own costs of drawing the fund out of Court (2).

(1) By Sec. 16, sub-sec. (3), of the Land Law (Ireland) Act, 1887, the redemption price of a rent-charge may be determined—(1) by agreement between the parties, (2) by consent that price be referred to the Commission, (3) by arbitration. As to practice, see Rules 60 to 64 of the General Rules of Court. As to redemption price, see *In re Givan's Estate* (*post*), where Mr. Commissioner MacCarthy, on evidence that a fee-farm rent was well secured, fixed the redemption price at 25 years' purchase of the net rent, after deducting the average poor rate for five years.

(2) This practice has since been altered. See decision of Mr. Justice Bewley in Lord Leconfield's Estate, *post*.

In re ESTATE OF THE MOST REV. BERNARD FINNEGAN AND OTHERS.

March 30, 1889.—*Trustees for charitable purposes—Sale of trust property to tenant-purchasers where no power conferred by deed of constitution—Statutory powers—Restrictions*—30 & 31 *Vic., c.* 54, *sec.* 14—*Consent of Commissioners of Charitable Donations and Bequests—Landlord and Tenant* (*Ireland*) *Act*, 1870, *secs.* 26 *and* 33—*Land Law* (*Ireland*) *Act*, 1881, *sec.* 25—*Land Law* (*Ireland*) *Act*, 1887, *sec.* 34.

Where lands were conveyed to trustees upon trust to apply the rents and profits towards certain charitable purposes, but no power of sale was conferred by the deed of constitution, and the trustees entered into agreements for sale under the Land Purchase Acts:

Held, that in the absence of the sanction of the Court of Chancery or the Land Judges, and not adopting the course prescribed by the Lands Clauses Consolidation Acts, the trustees could not make a valid title for the purpose of sale without the consent of the Commissioners of Charitable Donations and Bequests.

APPLICATION on behalf of the vendors to have the following question of law heard and determined pursuant to the 17th section of the Purchase of Land (Ireland) Act, 1885—"Whether trustees of lands held under a deed, not containing any power of sale, in trust to apply the rents and profits in assisting in the education and training of priests of the Roman Catholic Church in the Diocese of Kilmore, have power to sell such lands to the tenants under the Land Law (Ireland) Acts, or any Acts expressly or impliedly incorporated therewith, or whether the trustees require the authority or permission of the Commissioners of Charitable Donations and Bequests for the purposes of such sale, and if they have power to sell are they such persons as are entitled to the purchase money, so as to provide the guarantee deposit thereout?" A notice of motion dated the 18th of February, 1889, was served on the Attorney-General for an order on the above requisition. The matter came before Mr. Justice O'Hagan sitting with Mr. Commissioner Lynch and Mr. Commissioner MacCarthy on the 21st day of February, 1889.

On Mr. Drummond opening the case for the owners, it appeared that this notice, served on the Attorney-General, had been sent

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by him to the solicitor for the Board of Charitable Donations and Bequests. The solicitor for that board appeared and asked that the matter might stand over until counsel for the Board should be instructed. The case came on for argument on the 2nd of March, 1889. It was agreed that formal notice should be served on the Board of Bequests *nunc pro tem.*, and that the matter should be dealt with as if notice had been formally served upon them in the first instance.

The facts are as follows:—

By conveyance from the Landed Estates Court of the 22nd of July, 1876, part of the lands of Drumshinny, part of the lands of Lackan, and part of the lands of Forthill, containing together 109 acres, were granted to the Rev. Thomas O'Reilly in fee, subject to the tenancies and easements in the schedule thereto mentioned.

By indenture dated the 13th of September, 1881, after reciting that the said Rev. Thomas O'Reilly, with the intention of assisting persons desirous of becoming priests in the Roman Catholic Church, to be educated and trained in the diocese of Kilmore, had agreed with the Right Rev. Nicholas Conaty, the Very Rev. John Maguire, and the Very Rev. Francis O'Reilly, who were the then trustees of the Roman Catholic College of Cullies, near Cavan, to grant and convey these lands to them, he (the Rev. Thomas O'Reilly) granted the lands unto the said Right Rev. Nicholas Conaty, Very Rev. John Maguire, and Very Francis O'Reilly, their heirs and assigns, upon trust, after making certain payments to the Rev. Thomas O'Reilly, to apply the rents and profits in assisting in the education and training of priests for the Roman Catholic Church in the diocese of Kilmore, in such manner and at such time and times as the said Right Rev. Nicholas Conaty, Very Rev. John Maguire, and Very Rev. Francis O'Reilly, or other the trustees for the time being of the said Roman Catholic College of Cullies should think fit. By deed dated the 19th of April, 1883, after reciting that the said Very Rev. Francis O'Reilly was dead, the Right Rev. Nicholas Conaty and Very Rev. John Maguire purported to convey to the said Right Rev. Nicholas Conaty, Very Rev. John Maguire, Very Rev. John O'Reilly, Very Rev. Bernard Finnegan, Rev. James Dolan, and

Rev. Terence Brady, and to their heirs, amongst other lands, the lands of Drumshinny, Lackan, and Porthill, comprised in the conveyance from the Landed Estates Court of the 22nd July, 1876, to hold upon the trusts and for the intents and purposes, if any, upon which the same or any of them, or any part thereof were held, and subject to such trusts, if any, and so far as such trusts were not legally or equitably a charge on said lands, or any of them, to the use of the said Right Rev. Nicholas Conaty, Very Rev. John Maguire, Very Rev. John O'Reilly, Very Rev. Bernard Finnegan, Rev. James Dolan, and Rev. Terence Brady, their heirs and assigns for ever for their own use and benefit absolutely.

The trustees entered into agreements with three of the tenants for the sale to them of their holdings under the Land Purchase Acts. On the 17th of September, 1887, these agreements were lodged with the Land Commission. On the 28th September, 1887, the advances were sanctioned subject to the title being satisfactory. Upon the abstract of title being lodged, pursuant to the rules, a question was raised by the Examiner as to the power of the trustees to make a valid sale without the sanction of the Commissioners of Charitable Donations and Bequests. On this query the above requisition was lodged.

Messrs. Drummond and *Smith* for the owners.

Mr. G. V. Hart for Commissioners of Charitable Donations and Bequests.

O'HAGAN, J. [having stated the facts as already given]:—

The present owners are the surviving trustees of the deed dated the 19th April, 1883, and they hold the lands the subject-matter of the present application clothed with a trust, which is beyond question a charitable trust. It appears from the argument that the sanction of the Board of Charitable Donations had not been obtained, and, moreover, that it had been applied for and refused. In the instrument of trust there is no power of sale contained. I have under these circumstances to consider the title of the trustees and their power to sell.

Previous to the passing of the Land Act of 1870 sales by trustees of charity property to tenants were governed by the same

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law as sales by such trustees to any other purchasers. The sanction of the Court of Chancery might be obtained under its ordinary jurisdiction to administer charities upon information filed, or in a more summary way by petition, under Sir Samuel Romilly's Act (52 Geo. III., c. 101).

An express power to sanction sales of charity lands was bestowed in England upon the Charity Commissioners by the Act of 16 & 17 Vic., c. 137, s. 24; and in Ireland upon the Commissioners of Charitable Donations and Bequests by the 14th section of the 30 & 31 Vic., c. 54. That section empowers the Commissioners, upon application by the trustees or persons administering a charity, to authorise a sale of charity property if on inquiry they are satisfied that such sale would be advantageous to the charity.

Upon this authority being given, the trustees of the charity would, I apprehend, be free to carry out the sale so sanctioned without any recourse to the Court of Chancery. The 4th section of the same Act provides that before any proceeding in relation to the estate of a charity shall be commenced, notice in writing shall be served on the Commissioners of Charitable Donations and Bequests.

The 32nd section of the Landlord and Tenant (Ireland) Act, 1870, enacted that the landlord and tenant of any holding might agree for the sale to the tenant of the holding at the price fixed upon between them, and they might then apply to the Landed Estates Court to effect the sale. Section 33 declares that no such sale shall be made unless the landlord be either absolute owner of the land or such tenant for life or other limited owner as therein mentioned. The words "other limited owner" are declared to mean any body corporate, any trustees for charities, and certain other specified trustees. Section 34 directs the Court to make inquiries not only as to the circumstances of the holding, and as to the parties interested therein, but also as to the sufficiency of the price, and of the capacity of the landlord to sell, and if the Court approved of the application, it was to carry the sale into effect. This enactment would appear to clothe the Landed Estates Court with the power of sanctioning sales of charity lands to tenants. I think it clear that the proceeding to effect a sale was a proceeding within the 4th section of the 30th & 31st Vic., c. 54, so that the

inquiries directed to be made by the Landed Estates Court were to be made on full notice to the Commissioners of Charitable Donations and Bequests. Every safeguard was thus provided against improvident sales of charitable property.

By the Landlord and Tenant (Ireland) Act, 1872, the Board of Works is empowered to make advances to tenants for the purchase of their holdings, though the sale may not have been made through the medium of the Landed Estates Court, if the Board be satisfied with the value of the security. I do not think it could be well contended that this Act had the effect of enabling charity trustees to sell to tenants free from any necessity for the sanction of the Court of Chancery, the Landed Estates Court, or the Board of Charitable Bequests.

The next legislation on the subject is contained in the fifth part of the Land Law (Ireland) Act, 1881. By that Act the Land Commission is substituted for the Board of Works as the body to make advances to tenants to purchase their holdings, but no powers are conferred upon them to inquire into and sanction sales made by limited owners, such as were given to the Landed Estates Court by the Act of 1870. A power is given by the 23rd section to the Land Commission to sanction grants of judicial leases and fixed tenancies.

The provision as to sales by limited owners is of a very different character. It is contained in the 25th section:—"A landlord of a holding, being a limited owner as defined by the 26th section of the Landlord and Tenant (Ireland) Act, 1870, may by agreement, subject to the provisions of the Lands Clauses Consolidation Acts (except so much of the same as relates to the purchase of lands otherwise than by agreement), sell and convey such holding to the tenant, and may exercise to the same extent as if he were an absolute owner the power of permitting any sum not exceeding one-fourth in amount of the price which the tenant may pay as purchase money, to remain as a charge upon such holding secured by a mortgage, and in case of any advance being made by the Land Commission under the provisions of this Act to the tenant for the purchase of such holding, any such mortgage shall be subject to any charge in favour of the Land Commission for securing such advance, and any such mortgage and the principal moneys

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secured thereby shall be deemed to be part of the purchase money or compensation payable in respect of the purchase of such holding, and shall be dealt with accordingly in manner provided by the Lands Clauses Consolidation Acts, and in the construction of the said Acts for the purposes of this section the expression 'the special Act' shall be construed to mean this Act, and the expression 'the promoters of the undertaking' shall be construed to mean the tenant."

And by section 29—"Any body corporate, public company, trustees for charities, commissioners or trustees for collegiate or other public purposes, or any person having a limited interest in an estate or any right or interest therein, may sell the same to the Land Commission, and for the purpose of the purchase by the Land Commission of any estate or any right or interest therein the Lands Clauses Consolidation Acts (except so much as relates to the purchase of land otherwise than by agreement) shall be incorporated with this Act, and in construing those Acts for the purposes of this section the 'special Act' shall be construed to mean this Act, and 'the promoters of the undertaking' shall be construed to mean the Land Commission, and 'land' shall be construed to include any right or interest in land."

The definition of limited owner adopted by the 25th section of the Act of 1881 is not the definition contained in the 33rd section of the Act of 1870, but the definition contained in the 26th section, and this is quite intelligible, since the definition in the 26th section embraces every limited owner, while that contained in the 33rd defines limited owners "other than tenants for life." The definition in the 26th section of the Act of 1870 is, as regards such limited owners as we are now dealing with, as follows:—"Any body corporate, any corporation sole, ecclesiastical, or lay, any trustees for charities, and any commissioners or trustees for ecclesiastical, collegiate, or other public purposes entitled at law or in equity, in the case of freehold land, to an estate in fee simple or fee farm, and in the case of leasehold land to a lease for an unexpired residue of not less than 31 years, or for a term of years or of lives renewable for ever or renewable for a period of not less than 31 years."

Therefore, under section 25 of the Act of 1881, trustees for

charities not otherwise empowered to sell could only make title by adopting the method prescribed by the Lands Clauses Consolidation Acts in cases of sales by agreement made by persons under disability—*i.e.*, in brief, by having a valuation made by two able practical surveyors, and by paying the purchase money into Court if it exceeded the sum of £200. I am not aware of any sale to tenants having been carried out by a limited owner under the provisions of this section, but the legislation is clear. With respect to the greater number of limited owners, the powers conferred by the Settled Land Act of 1882 supersede any necessity for having recourse to the provisions of the 25th section of the Land Act of 1881, but as regards trustees for charities the Settled Land Act of 1882 is silent.

The Purchase of Land (Ireland) Act, 1885, enabled the Land Commission to advance the entire of the purchase money, retaining a guarantee deposit, and made very important provisions for carrying out sales by means of vesting orders, but did not in any way enlarge or otherwise affect the powers of limited owners to sell.

The Land Law (Ireland) Act, 1887, amended the previous law in several very important respects, but down to section 34 there is not anything that could be relied on as bearing on the question of the powers of trustees of charities to make sales to tenants. The 34th section is the section containing the definitions, and amongst these is the following:—"The word landlord shall for the purposes of sales to tenants under the Land Law (Ireland) Acts include any person entitled to an estate as a trustee for sale and any limited owner as defined by section 33 of the Landlord and Tenant (Ireland) Act, 1870." It was strongly urged that this definition had the effect of enabling landlords being limited owners, including trustees for charities, to sell to tenants as freely as if they were absolute owners. I am unable to come to this conclusion. Undoubtedly the definition is not confined to the Act of 1887 alone, but extends to the whole series of the Land Acts beginning with the Acts of 1870. Whenever, therefore, in these Acts we find the word landlord we should, unless the context otherwise requires, read the word as including a limited owner as defined by section 33 of the Act of 1870. But how far will this carry us? Under the previous legislation a specific but restricted power to sell to tenants

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was bestowed upon that class of landlords coming within the definition of limited owners. Trustees for charities entitled to receive the tenants' rents are undoubtedly landlords within the definitions both of the Act of 1881 and the Act of 1870, and did not require the definition in the Act of 1887 to make them so; but they are a class of landlords who can only make a valid sale either under their instrument of constitution or by virtue of a statutory power. The Legislature subjected them to restrictions which are certainly not expressly repealed. I find it impossible to say that the definition in the Act of 1887 amounts to an implied repeal.

Therefore, as in the present case the trustees of this charity have not obtained the sanction to these sales either of the Court of Chancery or the Land Judges or of the Commissioners of Charitable Donations and Bequests, and have not pursued the courses prescribed by the Lands Clauses Consolidation Acts, I am of opinion that they cannot make a valid title.

The second question, with respect to the guarantee deposit, need not be answered, having regard to my answer to the first.

Solicitors for Commissioners of Charitable Donations and Bequests: *Messrs. Maxwell & Co.*

Solicitor for vendors: *Mr. Kennedy.*

[NOTE.—See Purchase of Land (Ireland) Act, 1891, section 14, extending the definition of persons entitled to sell under the Purchase Acts—subject, however, "to such consent (if any) as would be required in case of a sale independently of said Acts."—ED.]

In re ESTATE OF CHARLOTTE SHORTT, Wife of John Shortt.

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27th April, 1889.—*Married woman—Annuity charged on lands—Restraint upon anticipation—Sale of lands discharged from annuity—Merger—Discretion of Court—44 & 45 Vic., c. 41, sec. 39—Jurisdiction of Land Commission—Land Law (Ireland) Act, 1881, sec. 48, sub-s. (d).*

Where a married woman being entitled to an annuity for her separate use without power of anticipation, subsequently became entitled to an estate in fee-simple in the lands out of which the annuity issued, and the income becoming insufficient to meet the annuity, entered into an agreement for sale of the lands to the tenant, discharged from the annuity. *Held*, she was disabled from selling the lands discharged from the annuity.

An annuity settled on a married woman for her separate use with restraint upon anticipation does not merge on her becoming entitled to an estate in fee-simple in the lands charged with the annuity.

The 48th section, sub-s. (*d*), of the Land Law (Ireland) Act, 1881, does not confer upon the Land Commission the special jurisdiction given by the 44 & 45 Vic., c. 41, sec. 39, to the Chancery Division of the High Court of Justice with regard to restraint upon anticipation, but is limited to making and enforcing orders for carrying into effect the objects of the Act.

APPLICATION on behalf of the vendor to have a question of law as to the sale to the tenant of certain lands in the county of Kilkenny determined by the Judicial Commissioner sitting with the Commissioners appointed under the Purchase of Land (Ireland) Act, 1885, pursuant to the 17th sec. of the said Act. The facts as stated are as follows :—

John Hely Owen, being seized in fee of part of the lands of Bawnballinlock, Co. Kilkenny, by his will, dated the 20th March, 1870, devised to his daughter, the vendor, Mrs. Shortt, an annuity of £40, charged thereon, for her separate use without power of anticipation, and devised the residue of his real and personal estate to his wife for her life with full power after his death to dispose of same amongst his children as she should by deed or will appoint. He died in November, 1870. By deed of appointment dated the 10th March, 1886, his widow, in pursuance of the power, appointed these lands to her daughter, Mrs. Shortt, and her heirs, and also assigned to Mrs. Shortt her own life-interest under the will. The present tenant of the lands held for a statutory term at the judicial rent of £31. The income became thus insufficient to meet the

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annuity. Mrs. Shortt contracted with the tenant for a sale to him of the holding for the sum of £665. When the title came before the examiner it was rejected on the ground of the restraint upon anticipation. A requisition was then lodged on the part of the vendor to determine the following question of law—namely, "Whether the bequest of the annuity under the clause against anticipation disables Charlotte Shortt from selling the fee, or whether the restraint on alienation is inconsistent with the character of a fee-simple estate?"

Mr. Shortt for the vendor.

O'HAGAN, J. [after stating the facts as above]:—

We have in this case a married lady entitled to a rent-charge issuing out of lands. This rent-charge is held for her separate use without power of anticipation. She is also the owner of the land out of which the rent-charge issues. As owner of the land she might, if it possessed any value, sell it subject to the rent-charge. But this is not what is sought for here. What is sought for is that the land should be sold discharged of the rent-charge—that is, in fact, that the rent-charge itself should be sold. Such is the manifest intent of the contract with the tenant. Now, is it possible upon any legal or equitable principle to do this? It is urged that it can be done on a twofold ground. First, it is said that when Mrs. Shortt became entitled to the estate in the lands the rent-charge became merged and ceased to have a separate existence. If Mrs. Shortt had been *sui juris* this result would, no doubt, have taken place at common law. Whether it would do so in equity would depend upon a number of circumstances, such as the express or implied election of the party, the existence of intervening incumbrances, and other matters, discussed in a series of authorities, into which it is unnecessary to enter. None of these authorities can have the least application to a charge settled to the separate use of a married woman who is restrained from anticipation. The very object of the restraint is to protect her against herself as well as against her husband. That she has other interests even in the same lands out of which the income subject to the restraint arises, is immaterial. If land be given to a married woman in fee-

simple for her separate use without power of anticipation, it is plain she could not part with the future income during her coverture. The law is thus concisely stated in Messrs. White and Tudor's "Leading Cases" in the notes to *Hulme* v. *Tennent* (1): "It" (the restraint upon anticipation) "is valid when annexed to a gift to a woman for her separate use, whether the subject of the gift be real or personal, or whether it be in fee or for life only." It is the same where portion only of the income is so settled. As to that portion her disposition is absolutely fettered—that is to say, apart from the judicial discretion conferred by modern legislation.

This brings me to the second point which has been urged. By the 44 & 45 Vic., c. 41, sec. 39, it is enacted that, notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. As regards Ireland, the Court, by sec. 72, sub-s. 2, means Her Majesty's High Court of Justice in Ireland. By sec. 69 all such matters within the jurisdiction of the Court are assigned to the Chancery Division of the Court. We have been referred to a case, *Re Flood's Trusts* (2), in which the Master of the Rolls in Ireland deemed the circumstances to be such as to render it right that he should make such an order. But how does the Land Commission (which is not a branch of the High Court) acquire such jurisdiction? It is argued that under sec. 48, sub-s. 3 (*d*), of the Land Act of 1881, the Land Commission has, for the making or enforcing any order whatever made by them for the purpose of carrying into effect the objects of the Act, all such powers, rights, and privileges as are vested in the Chancery Division of the High Court of Justice in Ireland for such or the like purposes. The Land Commission has, for the purpose of carrying the objects of the Act into effect, the powers of the Chancery Division with respect to making and enforcing orders, but do these general words confer upon the Land Commission the very special jurisdiction given by the Conveyancing Act of 1881 to bind a married woman's interest in property settled to her separate use with restraint upon

(1) Wh. & Tu. L. C. 520.
(2) 11 L. R. I. 355.

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anticipation? I am quite clear that they do not. I must, therefore, answer the requisition by stating my opinion that Charlotte Shortt is disabled from selling these lands discharged from the annuity of £40 a year.

Solicitors for vendor: *Messrs. Horan & Shortt.*

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In re ESTATE OF COUNT CONSIDINE.

In re ESTATE OF JAMES, COUNT CONSIDINE.

14th Dec., 1889.—*Purchase money—Advance between three-fourths and the whole—Payment in cash by tenant—Purchase of Land (Ir.) Act, 1885, sec. 2 (a)—Construction—Limitation of advance.*

The Land Commission has power to advance to a tenant to enable him to purchase his holding any sum between three-fourths and the whole purchase money, the tenant paying the difference between the amount of the advance and the amount of such purchase money, subject to such advance not exceeding £3,000 (sec. 2 Land Law (Ireland) Amendment Act, 1888), and subject to the provisions of the Purchase of Land (Irelaud) Act, 1885, as to guarantee deposit.

APPLICATION on behalf of the vendor and of the tenant to have the following question of law, as stated on a requisition lodged the 21st day of November, 1889, determined by the Judicial Commissioner sitting with the Commissioners appointed under the Purchase of Land (Ireland) Act, 1885, pursuant to the 17th section of the said Act—namely, "Whether, under the Land Law (Ireland) Acts, the Commissioners have power to advance to a tenant to enable him to purchase his holding any sum between three-fourths and the whole of the purchase money, the tenant himself paying the difference between the amount of the advance and the amount of the purchase money in cash, such advance not exceeding £3,000."

O'HAGAN, J.:—

The question argued before us is a very important one, and is clearly stated in the requisition. It arises under sec. 2, subsec. (*a*) of the Purchase of Land (Ireland) Act, 1885.

Before dealing with the precise terms of that section it is desirable to trace the course of previous legislation on the sub-

ject. By sec. 44 of the Landlord and Tenant (Ireland) Act, 1870, the Board of Works were empowered to advance to any tenant for the purpose of purchasing his holding in pursuance of the Act any sum not exceeding two-thirds of the price of the holding, and thereupon the holding was to be deemed charged with an annuity of 5 per cent. on the advance for 35 years. By sec. 45 of the same Act when the tenant is desirous to purchase his holding he may apply to the Board to advance any sum not exceeding two-thirds of the amount he may pay for the purchase, and when the tenant has been declared the purchaser of a holding, and has paid one-third, or any greater part of the purchase money, the Board may pay the balance of such purchase money instead of such tenant, the advance to be repaid by a like annuity of 5 per cent. By sec. 24 of the Land Law (Ireland) Act, 1881, the Land Commission may, if satisfied with the security, advance sums to tenants to purchase their holdings as follows—that is to say, when a sale is about to be made by a landlord to a tenant in consideration of the payment of a principal sum, the Land Commission may advance to the tenant for the purposes of such purchase any sum not exceeding three-fourths of said principal sum, and where the sale is in consideration of a fine and fee-farm rent, the Land Commission was authorised to advance any sum not exceeding half the fine; and, again, under sec. 26, dealing with estates purchased by the Land Commission and re-sold to the tenant, the Land Commission is empowered to advance to the tenant any sum not exceeding 75 per cent. (*i.e.* three-fourths) of the price, and to a tenant purchasing subject to a fee-farm rent, a sum not exceeding one-half the fine. The 34th section of that Act, sub-sec. 3, limits the amount of any advance made by the Land Commission to a tenant, except under special circumstances, to £3,000. This section was repealed by sec. 18 of the Land Law (Ireland) Act, 1887, which by sec. 17 provided that no advances should be made by the Land Commission to any one purchaser of land under the Land Law (Ireland) Acts exceeding the sum of £5,000 in all. The limit of £3,000 has, however, been restored by the 2nd section of the Purchase of Land (Ireland) Amendment Act, 1888, which provides that no advance should

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be sanctioned to any one purchaser exceeding £3,000 unless, in the opinion of the Land Commission, the advance of such larger amount is expedient for the purpose of carrying out sales on the estate of the same landlord.

Now, throughout the whole course of this legislation on the subject of advances by the State to tenants, the statutes carefully mention the proportion permitted to be advanced as the extreme limit. Any lesser amount might be advanced, and this is obviously reasonable, for the lesser the sum the greater is the security.

We come to the clause which we have to interpret. By sec. 2, sub-sec. (*a*), of the Land Law (Ireland) Act, 1885, the Land Commission may, if repayment of the advance is secured by a deposit under the Act, and if the Land Commission is satisfied with the security in other respects, make an advance to a tenant who is purchasing his holding of the whole principal sum or price payable by the tenant instead of the three-fourths thereof mentioned in Part 5 of the Land Law (Ireland) Act, 1881. The question that has been raised is whether the Land Commission has power to advance a sum greater than three-fourths, but less than the entire, purchase money. There does not seem any ground in point of reason for this departure from the whole course of previous legislation, but it is said to be made obligatory by the absence of any expression to indicate that once the three-fourths are overpassed the Commission can advance less than the entire. But counsel for landlord and tenant contended that the words "instead of the three-fourths" amount to a substitution of the entire for the three-fourths, provided there is the security of a guarantee deposit, and that as the three-fourths do not constitute an unalterable proportion, but are merely a limitation of the sum which might be advanced, the amount substituted should be considered in like manner as a limitation merely. It appears to me that this view derives a striking confirmation from another section of the statute of 1885. The seventh section of this Act provides that where the Land Commission has purchased an estate it may sell any parcels which it cannot sell to the tenants in such manner as it may think fit, and that the Land Commission may advance

to any purchaser of a parcel under this section, on the security of such parcel, "one-half of the principal sum paid as the price." It then goes on to declare that, "subject to this limitation on the amount of the advance, the provisions respecting sales to tenants should apply." The power in this case to advance one-half is enacted in terms quite as stringent as the power to advance the entire to tenants under section 2, and yet the Legislature itself treats it as a limitation only.

I am of opinion that the Land Commission has power under the Act of 1885, and subject to its provisions, to make an advance to a tenant of a sum between three-fourths and the whole of the purchase money, not, however, exceeding the amount permitted by the statutes I have referred to, and that the question in the requisition should be answered in the affirmative.

Solicitors for the vendor: *Messrs. D'Alton & D'Alton.*

[NOTE.—See Purchase of Land (Ireland) Act, 1891, sec. 23, sub-s. 2, authorising the retention of guarantee deposit in every case of an advance exceeding three-fourths.—ED.]

MacCarthy, C.

1890.
April 22.

In re ESTATE OF THE EARL OF EGMONT.

In re ESTATE OF THE EARL OF EGMONT.

April 22, 1890.—*Agreement for sale—Contract of tenancy—Sale of adjacent plantation—Occupation—Land Law (Ireland) Act*, 1881, *sec.* 57—*Land Law (Ireland) Act*, 1887, *sec.* 14, *sub-sec.* 3—*Tenancy created with the object of sale—Discretion of Commission.*

A tenant entered into an agreement for the purchase of his holding, part of which he held under a lease, and part, consisting of a plantation, under a written contract of yearly tenancy, of even date with the agreement for sale. Delay occurred in lodging the agreement with the Land Commission, and the tenant applied for and obtained a decree for specific performance of the contract, in the Court of Chancery, against the vendor. Before the advance was sanctioned by the Land Commission an objection was raised on behalf of the vendor—viz., that the tenant, although holding under a contract of tenancy, was not in actual occupation of the plantation at the time of entering into the agreement for sale, and that the acreage of the plantation exceeded the statutory limitation in respect of purchases of additional lands under the Purchase of Land (Ireland) Amendment Act, 1889.

Held, in sanctioning the advance, that it was not a question of physical occupation of the plantation. It was sufficient for the purposes of sale that the tenant was entitled to such occupation, holding under a written contract of tenancy, the validity of which was not disputed.

A tenancy created with the object of sale is within the rights of the contracting parties, but the Commission will exercise the discretionary power conferred by sec. (2) (*a*), Land Purchase Act, 1885, and other sections, in deciding on the application for an advance.

The provisions of the Purchase of Land (Ireland) Amendment Act, 1889, apply where no contract of tenancy exists, and are not retrospective.

Mr. Trench, Q.C., for the vendor.
Mr. D. MacCarthy Mahony for the tenant.

APPLICATION on behalf of Mr. M. J. Purcell, tenant purchaser, that certain queries in respect of the purchase of his holding be discharged, and that the agreement for sale be sanctioned.

COMMISSIONER MACCARTHY:

By an agreement for sale bearing date the 2nd of January, 1889, Lord Egmont agreed to sell, and Mr. Mathew J. Purcell, the tenant, agreed to buy, two lots of land near Churchtown, in the county of Cork. One of these lots, containing 117A. 0R. 31P., is held under a lease dated 10th June, 1810, made to the ancestor of the present tenant. It is a residential holding locally known

as Burton Park. The other lot, containing 31A. 3R. 8P., is held under a written contract of yearly tenancy dated 2nd January, 1889, being the same date as the agreement for sale. It is a plantation of oak, elm, beech, and fir, bounding and, to a certain extent intersecting, the tenant's old holding. For some unexplained reason this agreement for sale, although expressly framed under the Purchase of Land Act, was not lodged here within the two months prescribed by the rules. The tenant applied to the Court of Chancery to enforce his contract, and by a decree of the Vice-Chancellor, made on the 31st July, 1889, the agreement for sale was declared to be a valid and binding agreement which ought to be specifically performed, and Lord Egmont was ordered to do whatever might be necessary on his part to obtain the sanction of the Land Commission to the proposed advance. For some reason, likewise unexplained, a further delay took place. In December last the tenant, through his solicitor, gave notice to Lord Egmont that if he continued to disobey the order of the Vice-Chancellor he would render himself liable to sequestration of his goods and imprisonment. Lord Egmont replied through his agent that he was at a loss to understand why the agreement had not been lodged with the Commissioners, and that he was always anxious to proceed with the sale. The agreement was at length lodged on 23rd December last. The usual inspection of the holding by an officer of the Commission was directed. The holding was reported to be security for the advance irrespective of the buildings and the timber. The advance was about to be sanctioned when the Secretary of the Commission received a letter from Mr. Ed. White, as solicitor for Lord Egmont, calling attention to the provisions of the Purchase of Land (Ireland) Amendment Act, 1889 (commonly called Colonel Nolan's Act), and pointing out that, at the time the agreement for sale was entered into, Mr. Purcell was not in actual occupation of the plantation, and that the area and valuation of this lot exceed the statutory limitations in respect of purchases of additional land under Colonel Nolan's Act. A query on this point was accordingly raised by the Commissioners. The object of the present motion is to discharge this query and to obtain the sanction of the Court to the proposed advances.

Mac Carthy, C.

1890.
April 22.

In re ESTATE OF THE EARL OF EGMONT.

In dealing with the matter I propose to exclude personal complaints at both sides. I cannot understand why Lord Egmont's representatives delayed to proceed with the sale, but neither his late solicitor, Mr. White, nor his present solicitor, Mr. O'Sullivan, appear to be blamable for this delay. I presume that there must have been some good reason for the delay, seeing that the agreements in respect of other very extensive sales on this estate which were entered into last autumn have only quite recently been lodged here. At any rate, whatever delay the tenant in this case may have had to complain of has been remedied by the decree of the Vice-Chancellor. Moreover, Lord Egmont appeared on this motion by his counsel, Mr. Trench, instructed by his present solicitor, to disclaim all intention of impeding the sale, and to express his willingness to proceed in it without delay. Neither do I think that any reasonable complaint can be founded on Mr. White's letter calling attention to the provisions of Colonel Nolan's Act, and disclosing the fact that the tenant was not, as he considered, in actual occupation of the plantation at the date of the agreement for sale. The letter of Mr. Edward White was, in my opinion, a proper letter, worthy of his high professional character. In carrying out simultaneously several thousands of cases, involving vast sums of money and multifarious investigations, we must largely depend on the candour and good faith of solicitors. Mr. White was quite right in calling our attention to a fact of which we were unaware, and a difficulty that might have escaped our observation.

But, on the other hand, I see no substantial reason why the sale should not be sanctioned. The Vice-Chancellor declared the agreement for sale to be valid. It would require some very strong reason to justify me in dissenting from his decision. I discover no such reason. Colonel Nolan's Act does not apply to the case. It was not passed until long afterwards. It is not retrospective. It applies only to cases in which a tenancy did not exist at the time of the purchase. But here both parties swear to the existence of such a tenancy, and they produce the contract under which it was created, and under which the rent was made payable as from the 1st of May previous. It may be

objected that the tenant was not in physical occupation of the wood. This objection seems to me to be founded on a misconception. The old ceremony of taking possession by twig and sod is no longer necessary. It is hard to say in what the physical occupation of a large plantation consists. The main point is that the tenant was entitled to occupation. He had as good a right to enter the wood as he had to enter his drawing-room. Neither Lord Egmont nor his caretaker could have legally held the wood against him for an hour. It may be objected that the tenancy was created *ad hoc*, and only for the purpose of the sale, but it was within the right of the parties to create a tenancy *ad hoc*, and it is our duty to recognise it. For obvious reasons we must exercise great caution in dealing with tenancies thus created. We must see that there is no improper collusion. We must see that the new tenant is not a nominee of the vendor in a tenancy artificially created in order to oust the tenant whom it is the policy of the Act to root in the soil. But here no such questions arise. Mr. Purcell and his ancestors had been in occupation of the principal holding since 1810. The plantation had long been in the exclusive occupancy of the landlord. Mr. Purcell, when purchasing his holding, very reasonably wished to purchase an adjunct so desirable for purposes of ornament and of shelter, and the destruction of which would have seriously injured it. Lord Egmont reasonably facilitated his tenant's wishes.

I have pleasure in sanctioning their joint application, and I direct the proposed advance to be made, subject, of course, to the usual evidence of title and the other requirements of the rules.

Solicitor for the vendor: *Mr. W. T. O'Sullivan.*
Solicitor for the tenant: *Mr. A. O'Connor.*

Lynch, C.

1890.
May 6.

In re ESTATE OF THE DUKE OF ABERCORN.

JAMES HOUSTON, Purchaser.

(24 I. L. T. Rep. 85.)

In re ESTATE OF THE DUKE OF ABERCORN.

May 6th, 1890.—*Agreements for sale by vesting order—Jurisdiction to enforce, rescind, or vary—Purchase of Land Act*, 1885, *s.* 10—*Landed Estates Court Act*, 1858, *ss.* 37, 47—*Mistake in agreement—Specific performance—Land Law (Ireland) Act*, 1887, *s.* 22—*Land not held under a contract of tenancy—Land Law (Ireland) Act*, 1881, *s.* 57—*Purchase of Land Amendment Act*, 1889.

Where an agreement for sale provides that the sale shall be carried into effect by vesting order, the Commission has jurisdiction under the 37th section of the Landed Estates Court Act (incorporated by the 10th section of the Purchase of Land Act, 1885) to enforce, vary, or rescind an agreement; and in all cases where an application for an advance has been sanctioned the Commission has jurisdiction under the 22nd section of the Land Law (Ireland) Act, 1887, to make a decree for specific performance. Lord Waterford's Estate (22 Ir. L. T. Rep. 18–27) discussed.

In exercising the jurisdiction under the 37th section of the Landed Estates Court Act, the Commission follows the practice of the Landed Estates Court, and, if necessary, proceedings will be stayed in order to enable a suit to be brought in the Chancery Division.

Proceedings will always be stayed where a person interested requires a question of law to be heard and determined by the Judicial Commissioner.

APPLICATION on behalf of the vendor to rescind an agreement dated 28th May, 1889, for sale to Mr. James Houston of part of the lands of Liskey, on the ground of mistake. The facts are stated in the judgment.

Mr. John Ross, Q.C., for the vendor.
Mr. Houston, Q.C., for tenant.

COMMISSIONER LYNCH :—

This case comes before me upon a notice of motion on behalf of the Duke of Abercorn, in which he applies that the agreement entered into between him and Mr. James Houston on the 28th May, 1889, may be declared to be rescinded on the ground that the limestone quarry on the farm was, by mistake, not excepted to the landlord in the agreement for sale, or for such other order as to the Court shall seem meet. The facts of the case are shortly these. Mr. John Johnston, the uncle to the purchaser, was a tenant to the Duke of part of the lands of Liskey, con-

taining 28a. 1r. 35p. statute measure, at the yearly rent of £22 10*s.* 5*d.*, under lease dated 31st January, 1835, for one life or 21 years. The lease contained the usual reservation of royalties, &c., with the ordinary provisions for compensation to the lessee for loss, damage, or injury. There were further provisions enabling the landlord to plant timber on any portion of the premises, allowing the tenant the acreage rate payable for the portions so taken, and there was a like provision for the taking of land for roads. It appears from the affidavit of Mr. M'Farlane, the agent, that between 1840 and 1880 the landlord had from time to time resumed possession of portions of the lands so demised for the following purposes—For roads, 1r. 25p., upon which the rent was reduced by 4*s.* 1*d.*; for planting, 3r., with a reduction of 3*s.* 9*d.* in the rent; and for a quarry, 1a. 0r. 16p., for which a reduction of £1 16*s.* 5*d.* was made. The rent was thus reduced from £22 10*s.* 5*d.* to £20 6*s.* 2*d.*, at which it stood in 1880, but the actual rent charged since 1880 was £20; the total area of the land so taken up by the landlord being 2a. 1r. 1p. The lease expired in 1882, and it would appear that in that year Mr. James Houston acquired possession of the holding by assignment from his uncle, and has since paid the annual rent of £20 for it as tenant from year to year. I have no doubt from the evidence before me that the landlord has been in the undisturbed possession of the land thus from time to time taken up by him, and that he has used the quarry for the purpose of supplying limestone to his other tenants at cost price and for supplying road metal for the public roads. The cost of labour for raising these stones seems to have been estimated at 10*s.* by the hundred of stones (being the local measure of 12 feet long, 6 feet wide, and 3 feet high), and this would appear to be the average rate charged.

The Duke of Abercorn having determined to sell this portion of the estate to the tenants under the Purchase of Land (Ireland) Act, 1885, Mr. Houston appears to have entered into negotiations with Mr. M'Farlane in 1888 for the purchase of his holding, and to have stipulated that the quarry and plantation should be included in the sale. Mr. Houston states that he increased his offer from £400 to £450 upon the terms of the

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quarry and plantation being so included. Mr. James Stewart, a neighbouring tenant on the townland, seems then to have intervened, and I have no doubt from his own affidavits that he acted as the friend and mediator on behalf of Mr. Houston, and helped to make the bargain in reference to this quarry. Mr. M'Farlane, acting for the Duke, was willing to include it in the sale, provided he secured for the other tenants the same advantages as they enjoyed under the Duke of getting the stones at cost price, and it appears to me that Mr. Stewart and Mr. Houston agreed to the terms proposed as to this. There is no doubt that Mr. M'Farlane's authority, so far as he had authority from the Duke, was limited to selling the quarry with certain restrictions as to its user.

The position of the contracting parties on the 28th May, 1889, the date of the agreement for sale now before me, appears from the evidence to be this:—Mr. Houston was the tenant in occupation of 26a. 0r. 33p. of the lands of Liskey as a tenant from year to year at the annual rent of £20, while the Duke of Abercorn was in possession and occupation of 2a. 1r. 1p. of the land which was demised by the lease of 1835, and was rated for and paying the rates and taxes in respect of this land; but on the 28th May, 1889, the agreement was filled up, and in it the tenant was described, and as it appears to me inaccurately, as tenant from year to year of 28a. 3r. 15p. at the yearly rent of £22 10*s.*, the tenement valuation being stated at £22 10*s.*, and the price was fixed at £450. This was done, no doubt, with the object of bringing the quarry and plantation within the scope of the Purchase of Land (Ireland) Act, 1885, by describing it as part of the holding held under a contract of tenancy and in the occupation of the tenant. The evidence before me is that it was not then, and is not now, in his occupation. In the form of agreement then printed there is a space given for the insertion of any matters to be excepted from or provided for by the agreement, and assuming that the quarry formed portion of the holding, it was here that Mr. M'Farlane should have inserted the provisions as to the user of the quarry, but, in the hurry of business, I assume, this provision was omitted. The agreement was signed on the 28th May, and was lodged in our office on the 12th June. Almost immediately

afterwards Mr. M'Farlane appears to have discovered his mistake. On the 19th June he applied to Mr. Houston to have the agreement cancelled and a fresh one entered into. This Mr. Houston declined to do. Our inspector visited the holding in October, and he called my attention to this quarry and the manner in which it had been held or worked. I then called for evidence as to its occupation and user. The affidavit filed 29th January was made in reply thereto, and is the groundwork of the present application.

Before dealing, however, with the case as it comes before me on this notice I think it is desirable that I should state my views as to the preliminary objection raised by Dr. Houston—viz., that in the administration of the Purchase Act the Land Commission has no jurisdiction to rescind or vary contracts. He relied upon a decision of mine given in Lord Waterford's Estate (1) in support of his contention. That was a case in which it was agreed that the proceedings were to be carried out by conveyance, and, as I pointed out in my judgment, in such proceedings the Land Commission has no jurisdiction to set aside contracts for sale entered into between vendors and purchasers.

In the present case it was agreed that the sale should be carried out by vesting order (2), and we have in such cases all the jurisdiction which was conferred on the Landed Estates Court by the sections of the Landed Estates Act which are incorporated by the 10th section of the Purchase Act of 1885, and first amongst these is the 37th section, which provides "that the Court shall have all the powers, authority, and jurisdiction for enforcing, rescinding, or varying any contract for sale made under this Act, and in other matters incident to or consequent on a sale under this Act, as are vested in a Court of Equity in relation to a sale under the direction of such Court."

(1) 22 Ir. L. T. Rep. 18.

(2) Under the Rules of 15th August, 1891, all agreements must provide for the sales being carried into effect by vesting order, otherwise they will not be received unless by order of a Commissioner. To obtain such an order it must be shown that proceedings by conveyance would be more desirable for the interests of the parties concerned, or could be more expeditiously carried out. (See Rule 11 of the General Rules of the 15th of August, 1891.—ED.)

Lynch, C.

1890. May 6.

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No one is more careful than I am in abstaining from assuming jurisdiction which does not properly belong to me, and even in cases where I have no doubt as to my jurisdiction, I often abstain from its exercise, in order that the parties may have an opportunity of obtaining the judgment of the High Court or of having a point of law heard and determined by the Judicial Commissioner, as provided by the 17th section of the Act of 1885 (1).

Cases sometimes arise here involving matters of construction, the validity of deeds, or the competency of the vendor to sell. These questions, when contested, may fittingly be relegated for decision to another tribunal; but I am not prepared to abdicate my jurisdiction in matters in which I am bound to exercise it, and in which, as in the present case, the Landed Estates Judges before the passing of the Judicature Act would (and I speak with an experience of over thirty years in that Court) have exercised their jurisdiction in proceedings under the 47th section (vendor and vendee clauses) of that Act. Here is an agreement for sale entered into between the landlord and tenant; it is conditional upon our making the advance applied for; there is a dispute as to the terms of sale and the thing contracted to be sold; and I am asked in the face of the 37th section of the Landed Estates Act, and of the 22nd section of the Act of 1887, which provides that either party to an agreement for sale may apply in a summary manner to the Land Commission to decree specific performance of the agreement, to hold my hand in order that a suit might be instituted before the County Court Judge of Antrim (the purchase money being under £500) to determine the narrow question in issue before me. In the interest of the cheap and speedy administration of the Purchase Act I am not prepared to delegate to the County Court Judge duties which I am here to discharge. If instead of the Duke of Abercorn instituting the present motion, he had declined to proceed, and Dr. Houston's client had applied

(1) Under the Purchase of Land (Ireland) Act, 1991, sec. 28, sub-sec. 8, and 78th General Rule of the 18th August, 1891, the Commissioner may by order refer the proceedings before him to the Judicial Commissioner to decide any question of law, or he may in a case, signed by him, state any question of law to be so determined—ED.

to me, under the 22nd section of the Act of 1887, to decree specific performance, could Mr. Ross have contended here that by analogy I had no jurisdiction, and that the case should be relegated to the County Court to be tried in an action instituted for that purpose upon a repetition of the evidence which is spread out in the eight affidavits which have been used on this motion? I think not, and having no doubt as to my jurisdiction, and being of opinion that the matter at issue is one in which I am bound to exercise that jurisdiction, I shall proceed to deal with the case on the facts before me.

I have already stated what, in my opinion, was the position of the parties to this agreement on the 28th May, 1889. It would have been perfectly proper for the Duke of Abercorn's agent to have excluded not only this quarry but the plantation and road from the agreement for sale, assuming that Mr. Houston was willing to purchase his actual holding, and that they agreed as to the price. But Mr. Houston was naturally anxious to acquire the plantation, which was within the ambit of his holding, and the quarry, which was on the borders of it; and it appears to me perfectly clear that the parties agreed to the sale at £450 of the holding, the plantation, and the quarry, and that the additional £50 was the consideration for their inclusion. I am also satisfied that Mr. M'Farlane stipulated for the supply of limestone to the tenants at cost price by Mr. Houston, and that Mr. Houston verbally assented to this condition, and I consider that this was a most reasonable stipulation for Mr. M'Farlane to make. We have heard recently of the possibility of another king arising "who knew not Joseph," and the Duke of Abercorn was naturally anxious to secure his tenants against such a contingency.

The Purchase of Land (Ireland) Amendment Act, 1889—known as Colonel Nolan's Act—provides for the acquisition by purchase of additional land not held under a contract of tenancy by tenants buying under the Purchase Acts, where the Commissioners considered it expedient that such land should be sold with the holding. This is one of the cases which would properly come under this Act, and I am anxious to afford every facility for the carrying out in this case of what I believe to have been

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the actual agreement as to the inclusion of this additional land. The arrangement was that the Duke of Abercorn's tenants were to get as heretofore limestone at cost price. I exclude altogether the supply of metal for the county roads, or the terms upon which contractors might obtain it, if that had been the matter in dispute, as I think the Grand Jury Acts make ample provision for the obtaining of road metal, and contractors are fully protected. But the tenants of this and the adjoining townlands are in a different position, and I am of opinion that the privileges they had under the Duke of Abercorn ought to be secured to them. Mr. Houston in his affidavit, filed the 1st day of February (paragraph 9), says that Mr. M'Farlane—through the estate bailiff—asked him to fix the price at 7*s.* the cwt., while Mr. M'Farlane and Mr. Stewart name 10*s.* as the sum mentioned before the agreement was signed. There is, however, much force in the point made by the purchaser in that paragraph as to difficulty of now fixing the price at which limestone may be raised, having regard to the probable changes in the price of labour, and Dr. Houston very properly pressed this point in his argument. I think it would be unfair to attempt to define by any order now made the cost price of limestone, but the purchaser can be bound to supply limestone to the owners and occupiers for the time being of this and the adjoining townlands to which this privilege was extended in the past, for the purposes of their own holdings, at the actual cost of quarrying and raising same. I am therefore prepared, if the parties here accept these terms, to make an order sanctioning the advance of the £450 for the purchase of the holding, the quarry, and plantation, subject to this reservation. If, however, these terms are not accepted, I shall refuse to sanction any advance upon the present agreement, with liberty for the parties to apply upon a new agreement for an advance of £400 for the purchase of the holding, excluding the plantations, quarry, and roads.

Now, as to the costs of this application, I think both parties are to blame. The agreement was carelessly prepared by Mr. M'Farlane, and if the statement as to 7*s.* a cwt. be accurate, his subsequent requisitions were unreasonable, and even his notice as to the exclusion of the quarry was too widely drawn. On

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the other hand, I am afraid that Mr. Houston was anxious to avail himself of the omissions to import into the agreement the actual terms of the sale, and he has sought to support his case by representations as to the user and rating of this quarry, which have been disposed of before me. A number of unnecessary affidavits have been filed, and having regard to all the circumstances, I feel that justice will be done by directing that both parties are to abide their own costs.

Order accordingly.

Solicitor for the vendor: *Mr. William Wilson.*
Solicitor for the tenant: *Mr. R. H. Todd, LL.D.*

In re ESTATE OF LORD FERMOY.

Litton, J.

1890.
August 4.

In re LORD FERMOY'S ESTATE.

August 4, 1890.—*Legacy duty—Rent-charge created by will—Duty payable out of the subject of bequest—Words of exemption—Real estate charged—Intention of testator—Liability of legatee—Succession duty—Priority—*16 & 17 *Vic., cap.* 51, *sec.* 52.

E. R., by will, when settling his estates, conferred upon the tenant for life and others entitled in remainder, if in receipt of the rents and profits, a power to appoint by way of jointure a rent-charge of £500 Irish, to be paid "tax free and without any deductions," and chargeable upon all or any part of the settled estates. This power was exercised and all the devised estates charged accordingly.

By a codicil to his will the testator directed that during the continuance of every life estate in possession, the person for the time being entitled in remainder, in tail, or for life should be entitled to a "clear yearly rent-charge" of £500 sterling during his continuing so entitled, chargeable upon all the real estate.

Agreements for sale to the tenants of portion of the estate, under the Land Purchase Acts, were subsequently entered into by the present owner, and a claim was made by the Commissioners of Inland Revenue for legacy duty against the proceeds of the sale in respect of both rent-charges.

Held, that the Commissioners of Inland Revenue were entitled to their claims in respect of both rent-charges.

Legacy duty is payable out of the subject of the bequest, unless it is expressly charged upon real or personal estate according to its nature; but the intention of the testator that it is to be paid free of duty must be clearly shown.

Nevertheless, such intention will not interfere with the personal liability imposed by statute, but personal liability will not relieve the real estate when expressly charged.

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In re LORD FERMOY'S ESTATE.

On an alternative claim for succession duty an objection was raised by T. S., an incumbrancer, to payment in priority to his mortgage, on the ground that before making the advance he had obtained a certificate, pursuant to 16 & 17 Vic., cap. 51, sec. 52, from the Inland Revenue Department that all duty had been paid.

Held, that if he was a *bonâ fide* purchaser without notice his mortgage had priority over the claim for succession duty.

APPLICATION on behalf of Mr. Saunders, an incumbrancer, to have the following questions of law as to certain claims for legacy and succession duty by the Commissioners of Inland Revenue, as stated on requisition lodged the 14th day of July, 1890, determined by the Judicial Commissioner sitting with the Commissioners appointed under the Purchase of Land (Ireland) Act, 1885, pursuant to the 17th section of the said Act, namely:—

"I. Whether the legacy duty claimed by the Inland Revenue on foot of an annuity of £500 per annum to the vendor is a charge upon and payable out of the lands for sale in this matter?

"II Whether the legacy duty claimed by the Inland Revenue on foot of an annuity of £500 Irish (=£461 10*s.* 9*d.* English) to the Dowager Lady Fermoy is a charge upon and payable out of the lands for sale in this matter?

"III. Whether the alternative claim by the Inland Revenue for succession duty in respect of the apparently erroneous deduction of £500 per annum in the account of Lord Fermoy's succession has priority over the mortgage No. 23 in the schedule of incumbrances in this matter, having regard to the certificate of the Commissioners, pursuant to the 52nd section of the 16 & 17 Vic., c. 51, dated 31st January, 1884, if the said Thomas Saunders, incumbrancer No. 23, be held to be a *bonâ fide* purchaser without notice?"

Mr. Shekleton, Q.C., for Mr. Saunders.

Mr. T. Pakenham Law, Q.C., for Mr. Fry, a trustee.

Mr. Matheson for the vendor.

The Solicitor-General and *Mr. Thomas Wall* for the Crown.

The facts of the case are set forth in the judgment.

LITTON, J.:—

The question with which I will first deal is this—Whether the legacy duty claimed by the Inland Revenue on foot of the rent-

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charge of £500 Irish (equivalent to £461 10*s.* 9*d.*), to which the Dowager Lady Fermoy is entitled, is a charge upon and payable out of the lands for sale in this matter.

The late Edward Roche by his will dated 27th August, 1824, when settling his estates in the county of Cork, conferred a power on his nephew and devisee, Edward Roche, whom he constituted first tenant for life, and also on the several other persons entitled in remainder, during their lives, if in receipt of the rents and profits of the estate, by deed to grant, limit, or appoint to the use of any woman he might marry, for her jointure and in lieu of dower, "any annual sum or yearly rent-charge not exceeding £500 Irish to be payable tax free and without any deduction," to be issuing out of and chargeable upon all or any part of his said real estate, with such powers and remedies for the recovery thereof, and such term of years of the better securing thereof, as the person exercising the power might deem fit. The testator died in 1828. He was succeeded by his nephew, Edward Roche, the first tenant for life. The latter died in 1855, whereupon Edmund Burke Roche, first Lord Fermoy, became tenant for life in possession; and by deed, dated 12th September, 1855, he exercised the power of jointuring conferred by the will of August, 1824, in favour of his wife, the present Dowager Lady Fermoy. He by this deed granted to her for her life an annual sum of £461 10*s.* 9*d.* charged upon all the devised estates, which include the lands for sale in this matter, to be paid tax free and without any deduction, with powers of distress and entry, and also limited a term of 200 years for the further and better securing the rent-charge.

There is no doubt that the rent-charge so created is a legacy (*Attorney-Gen.* v. *Jackson* (1) and *Stow* v. *Davenport* (2)), and that the Inland Revenue is entitled to duty in respect of it. This is not disputed, but it has been argued by Mr. Shekleton on behalf of Mr. Saunders, an incumbrancer, that the Crown can only look to the legacy itself and not to the lands subject to the rent-charge, and that while the unpaid duty constitutes a Crown debt from the legatee and the persons whose duty it is to pay

(1) 2 Cr. & Jerv. 101. (2) 5 B. & Ad. 359.

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the legacy, yet the Crown has no right to insist on the duty being paid out of the proceeds of sale of the estate, but should be left to their remedy against the persons liable.

It is clear that legacy duty is only payable out of the subject of the bequest, *unless* the will contains words of exemption, showing that the personal estate in the case of a pecuniary legacy, or the real estate where the legacy issues out of and is charged on land, is to bear the duty. It cannot be questioned that a testator *may* impose on his real estate the obligation of discharging legacy duty, and create a charge in favour of the Crown for the duty. In *Gude* v. *Mumford* (1) Alderson, B., says: "It is clear that the principles upon which questions as to the payment of legacy duty proceed are those which govern the construction of wills. In order to arrive at the decision that a legacy is to be paid free of duty the Court must be satisfied that the intention of the testator in that respect has been clearly made out. *Prima facie* the law must take its ordinary course, and the legacy must be left in the circumstances in which the law places it. Nevertheless it is competent for the testator by words to direct otherwise."

Directions in a testator's will do not interfere with the personal liability imposed by statute on the parties liable, but the fact that the personal obligation remains does not relieve the real estate if it be in fact charged.

In the present case I am of opinion that the lands in question are charged with the duty by force of the testator's will and the deed of September, 1855, exercising the power, as well as with the legacy, that the duty is a charge on the estate, and that the Inland Revenue is entitled to be paid out of the proceeds of sale of the lands charged.

With respect to the question whether the legacy duty claimed by the Inland Revenue on foot of the £500 per annum, which Lord Fermoy became entitled to during the life of his father from 1855 to 1874, the matter is not in my mind so clear.

This legacy was given by a codicil to the testator's will, dated 22nd July, 1828. The testator directed that during the

(1) 2 Yo. & Coll. Ex. 448.

continuance of every life estate in possession, the person for the time being entitled in remainder in tail or for life should be entitled to an annuity or clear yearly rent-charge of £500 sterling during his continuing so entitled, to be charged and chargeable on all his real estate, with power to distrain for the same and all costs, as landlords are by law entitled on non-payment of rent in common leases.

Having regard, however, to the cases cited in the argument, and particularly to *Noel* v. *Henley* (1), *Gude* v. *Mumford* (2), *Re Cole's Will* (3), I have come to the conclusion that in this case also the estate is charged not alone with the annuity, but also with the duty. I do not see how, in principle, this case can be distinguished from those where the general personal estate has been onerated with the duty—where similar words have been held to indicate the testator's intention to give the legacy free.

I therefore hold that the contention of the Inland Revenue in this instance must also prevail.

III. With regard to the third question put by the requisition, I am of opinion that if Mr. Thomas Saunders be a *bonâ fide* purchaser without notice, the certificate of the Commissioners of Inland Revenue given pursuant to the 52nd section of 16 & 17 Vic., c. 51, operates to give his mortgage priority over the claim for succession duty in respect of the deduction of £500 a year in Lord Fermoy's succession duty account.

I think it perfectly plain that Lord Fermoy—if he now claims exemptions from legacy duty in respect of the £500 a year, on the ground that he never received it—is bound to pay succession duty in respect of the credit erroneously claimed and allowed in the succession account.

Solicitors for Mr. Saunders: *Messrs. Gordon & Son.*
Solicitors for Lord Fermoy: *Messrs. Keily & Lloyd.*
Solicitor for the Crown: *Mr. R. O'B. Furlong.*

(1) 7 Pri. 241. (2) 2 Yo. and Coll. Ex. 448. (3) L. R. 8 E. 271.

MacCarthy, C.

1890.
Dec. 2.

In re ESTATE OF ELIZABETH GIVAN.

(Ir. L. T. Rep.).

In re ESTATE OF ELIZABETH GIVAN.

Dec. 2, 1890.—*Redemption of rents—Determination of redemption price by Land Commission on consent of parties*—50 & 51 *Vic., c.* 33, *s.* 16, *sub-s.* (3).

Where a fee-farm rent of £26 5*s.* 9*d.*, issuing out of lands sold in the matter, was directed to be redeemed, and the parties consented that the Land Commission should determine the redemption price, pursuant to the 16th section of the Land Law (Ireland) Act, 1887, the Court, on evidence that the rent was amply secured, fixed the redemption price at twenty-five years' purchase of the net rent, after deducting the average poor rate for the previous five years.

APPLICATION, on behalf of the vendor, for an order that the yearly rent of £26 5*s.* 9*d.*, created by fee-farm grant of 13th May, 1875, and issuing out of part of the lands of Lower Ruskey, and Upper Ruskey and Tralee, containing together 61a. and 20p., statute measure, situate in the barony of Loughinsholin, and County of Londonderry, sold in the matter, be redeemed at a price to be determined by the Land Commission.

The rent sought to be redeemed issued out of a holding producing £100 a year, which the vendor in the matter had agreed to sell to the tenant for £1,396 freed from the rent. The rent was payable to the Rev. R. W. Browne, who formerly held the same with other hereditaments, subject to a superior rent of £43 12*s.* 8*d.*, but who had purchased the superior rent in 1881 from the Commissioners of Church Temporalities under the Irish Church Act, at twenty-five years' purchase, three-fourths of the purchase money being secured by mortgage.

Mr. Henry appeared for the vendor.
Mr. Bell appeared for the Rev. R. W. Browne.

COMMISSIONER MACCARTHY :—

In this matter I am applied to by the vendor and by the Rev. Robert Wilson Browne, who is entitled to a fee-farm rent of £26 5*s.* 9*d.*, payable out of the lands sold to the occupying tenant, to fix the redemption price of the rent, pursuant to the 16th section of the Act of 1887, and a consent is filed by the parties that

such redemption price should be determined by the Land Commission. The holding consists of about 61 acres in the County Londonderry. The rent heretofore payable by the tenant was £100, and the purchase money is £1,396. The vendor is bound by her contract to sell discharged of the fee-farm rent. An order for the redemption has been made. The question now is what redemption price should be fixed? On behalf of the owner of the rent it is contended that the price should be such an amount as if invested in an authorised investment would yield an income equal to the rent. This is a contention which cannot be sustained. Head landlords are entitled to the full benefit of the priority of their claims, but to nothing more. On behalf of the vendor in the matter it is contended that, as she sold for 14 years' purchase, this rate or something like it should be the measure of the value of the fee-farm rent. This contention also must be negatived. The head landlord is not bound by a contract with which he had no privity. A fee-farm rent is obviously more valuable than an occupation rent. Considerable debate arose as to whether I should receive in evidence the fact that Mr. Browne had redeemed, under the Irish Church Act, at 25 years' purchase, a superior rent payable by him to the Commissioners of Church Temporalities out of this very parcel of land and other lands, and as to what weight I should give to such evidence. I received the evidence, but I do not think it is entitled to much weight. The Church Acts were passed for different purposes, and purchasers under these Acts were differently situated. Dismissing from my mind these more or less irrelevant considerations I return to the question: what is the value of a rent of £26 5*s.* 9*d.*, issuing out of 61a. in the county of Londonderry, of which the occupation rent is £100 a year?

Until a few years since there could be no question that such a rent was worth 25 years' purchase, the lands being situate in a prosperous district, and the occupation rent providing a margin of nearly 75 per cent. It is unhappily the fact that many causes have operated since to reduce the value of agricultural land in Ireland, and I by no means underrate the effects thus produced on agricultural values. But has this reduction proceeded so far as to effect the value of a rent payable under the circumstances

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mentioned? I do not think so. In this case, moreover, I have the concrete fact that this parcel of land has brought in cash a sum sufficient to purchase the head rent at more than 50 years' purchase.

Under these circumstances I must arrive at the conclusion that the rent is worth 25 years' purchase of the net amount after deducting the average poor rate for five years last past, and I accordingly determine the redemption price at that amount.

I allow the Rev. R. W. Browne the costs incident to the order for redemption and to this motion with counsel, but he must be at the cost of proving his title to the redemption price according to the practice of this Court (1). The vendor's costs to be costs in the matter.

Order accordingly.

Solicitors for the owner: *Messrs. Glover & M'Guckin.*
Solicitor for the Rev. R. W. Browne: *Mr. J. C. Bell.*

(1) It is now the practice, pursuant to the decision in *Lord Leconfield's Estate* (p. 63, *post*), to provide for the costs of the owner of a head-rent in making title to and drawing out the redemption price. In cases in which title has not already been shown the title to the head rent should be made on affidavit setting forth concisely the title to the rent and all incumbrances affecting the claimant's interest and whether it is subject to any superior rent.—See Rule 69 of General Rules of 15th August, 1891.—ED.

In re ESTATE OF LORD LECONFIELD.

(XXV. I. L. T. Rep. 28.)

Bewley, J.

1891.
Feb. 2.

In re LORD LECONFIELD'S ESTATE.

Feb. 2, 1891.—*Redemption of impropriate tithe rent-charge—Question as to costs a "question of law"—Owner entitled to costs of making title thereto, and to costs of drawing out redemption price—Purchase of Land Act*, 1885, *s.* 17—*Land Law Act*, 1887, *s.* 15.

When, in proceedings under the Purchase of Land Acts and the Rules made thereunder, a question arises as to costs, although under these Rules such costs are in the "discretion" of the Land Commissioners, yet by discretion is meant a judicial discretion, and if it is alleged that such costs were granted or withheld contrary to law, a "question of law" arises, which any person interested can require the Judicial Commissioners to hear under section 17 of the Purchase of Land Act, 1885 (1).

When an impropriate tithe rent-charge is ordered to be redeemed under section 15 of the Land Law (Ireland) Act, 1887, for the purpose of selling the land on which it is charged, the owner of such tithe rent-charge is entitled to the costs and expenses of making title to such tithe rent-charge, and to the costs of making application for the payment to him of the redemption price of such tithe rent-charge.

APPLICATION on behalf of the owner of an impropriate tithe rent-charge issuing out of part of the lands for sale in this matter to have the following question of law, as stated on a requisition lodged the 23rd of December, 1890, determined by the Judicial Commissioners, sitting with the Commissioners appointed under the Purchase of Land (Ireland) Act, 1885, pursuant to the 17th sec. of the said Act—namely, "Whether the applicants, Thomas Fitzgerald and George Mostyn, the trustees of Lord Southwell, are not entitled to be indemnified against the costs and expenses of making title to an impropriate tithe rent-charge of £10 15*s.* 6*d.*, ordered to be redeemed in this matter, and of drawing the redemption price thereof out of the Bank of Ireland, the same as in other cases of compulsory purchase."

The circumstances under which the requisition was lodged are as follows :—

The trustees of Lord Southwell were owners of an impropriate

(1) An appeal from the decision of any Commissioner acting alone, if on a question of law only, is now to the Judicial Commissioner; in any other case the appeal will be to three Commissioners, one of whom must be the Judicial Commissioner, one a Commissioner appointed under the Purchase of Land (Ireland) Act, 1885, and the third a Commissioner appointed under the Land Law (Ireland) Act, 1881.—*Vide* sec. 29 (1), Purchase of Land (Ireland) Act, 1891.

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tithe rent-charge of £10 15*s.* 6*d.*, charged on part of the estates of Lord Leconfield, which had been agreed to be sold under the above Act to the tenants thereon. An application was made in the Court of the Irish Land Commission on behalf of the vendor, under section 15 of the Land Law (Ireland) Act, 1887, to order the redemption of this tithe rent-charge, and fix the redemption price. The owners of the tithe rent-charge applied for the costs of making title to such tithe rent-charge and of applying to have the redemption price thereof paid to them. By an order dated the 2nd July, 1890, Mr. Commissioner Lynch ordered that the tithe rent-charge should be redeemed at the price or sum of £199 1*s.* 8*d.*, to be paid into the Bank of Ireland to a separate credit, and gave Lord Southwell's trustees the costs incident to this order, but refused their application for the costs of making title to such tithe rent-charge, and of applying to have such redemption price paid out of the Bank of Ireland to them.

The trustees of Lord Southwell appealed to the Court of Appeal from so much of Mr. Commissioner Lynch's order as refused them the costs of making title to the tithe rent-charge, and of drawing the redemption price of such tithe rent-charge out of Court. The Court of Appeal made the following order, dated August 5th, 1890:—"Upon motion of counsel, on behalf of Thomas Fitzgerald and George Mostyn, trustees of the estate of Arthur Robert Pyers Viscount Southwell, a minor, in the order appealed from mentioned, made unto the Court on the 1st day of August, inst., and this day by way of appeal from the order herein of the Irish Land Commission, dated the 2nd day of January, 1890, so far as the same refuses the application of the said trustees for costs in respect of making title to the impropriate tithe rent-charge therein mentioned, and drawing out the redemption price in the said order also mentioned. And on reading the notice of appeal, dated the 22nd July, 1890, the said order of the Irish Land Commission, the affidavit of John H. O'Donnell, filed on the 22nd day of July, 1890, and on hearing what was alleged by the said counsel and by counsel for the vendor; and it appearing that the appellants had required that the questions of law arising in this appeal should be heard and determined by the Judicial Commissioner sitting with the additional Commissioners, and that the said questions have not

been so heard and determined—It is ordered that so much of the said order of the Irish Land Commission as is appealed against do stand discharged, and that this case be remitted to the said Land Commission, to proceed therein as to justice shall appertain, and it is further ordered that the parties, appellants and respondent, do respectively abide their own costs of the appeal."

A requisition was then lodged stating the above question of law.

Mr. D. Fitzgerald, Q.C., and *Mr. J. W. Richards*, for the owners of the tithe rentcharge, referred to the Land Purchase clauses of the Land Act, 1870, the Land Law Act, 1881, and the Purchase of Land Act, 1885, and the Land Law Act, 1887, and argued that until the last Act there was no statute under which tithe rentcharges could be compulsorily redeemed, and that under these statutes and the rules thereunder incumbrancers were entitled to be paid off, free of costs.

They also cited Lloyd on Compensation (1), *Re Westminster Estate, Parish of St. Sepulchre* (2), *Ex parte Rayner* (3), *The Queen* v. *St. Luke's Vestry* (4), *Earl of Berkeley's Will* (5), *Re Bethlem Hospital* (6), and the cases therein referred to.

Mr. Graves Cathrew, for the vendor,

Relied on Rule 107 of the Land Purchase Rules, 1887, that such costs were in the discretion of the Commissioners, which had been exercised, so that no appeal lay therefrom; and also on the settled practice of the Commissioners, which had never allowed such costs, although similar cases had been frequently before them.

BEWLEY, J.:—

The question submitted for my decision in this case is: Whether the trustees of the estates of Arthur Robert Pyers Viscount Southwell are not entitled to be indemnified against the costs and expenses of making title to the impropriate tithe rentcharge ordered to be redeemed in this matter and of drawing the redemption price thereof out of the Bank of Ireland, as in other cases of compulsory purchase? A preliminary question was raised as to

(1) 1877 ed., pp. 63 and 64.
(2) 4 De G. J. & S. 232.
(3) 3 Q. B. D. 446.
(4) L. R. 6 Q. B. D. 572.
(5) L. J. 10 Ch. 56.
(6) L. R. 19 Eq., pp. 456, 457.

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whether this was "a question of law" within the meaning of the 17th section of the Purchase of Land (Ireland) Act, 1885, and although this point was not seriously pressed, I think it right to express my views upon it. In the first place, the order of the Court of Appeal of the 5th August, 1890, discharging so much of the order of the Irish Land Commission dated the 2nd July, 1890, as was appealed against, so that the question of law arising on the appeal should, in the first instance, be heard and determined by the Judicial Commissioner, seems to imply that this question was such as might properly be dealt with by the Judicial Commissioner; but independently of the effect of the order of the Court of Appeal, the question mentioned in the requisition appears to me to be "a question of law" within the meaning of the section referred to.

The rights as to costs in matters under the Purchase of Land Acts are regulated by the 107th of the Rules of the 5th December, 1887, made under the powers conferred by the 50th section of the Land Law (Ireland) Act, 1881; and by this rule it is, amongst other things, provided that—"The Commissioners shall have full power and discretion as to the giving or withholding of costs and expenses, and as to the persons by whom, and the funds out of which, the same shall, in the first instance, or ultimately, be paid, repaid, or borne; and may apportion the same amongst such parties, and in respect of interest, rents, or income, and principal or corpus as they shall see fit;" and a prior portion of the same rule contains a provision that "every incumbrancer shall have with his demand his costs properly incurred unless the Commissioner shall otherwise direct."

The "discretion" given to the Commissioners by this rule in the awarding or withholding of costs is a judicial discretion, and is certainly not larger than the discretion exercised by the High Court of Justice in Ireland, under the 53rd section of the Supreme Court of Judicature (Ireland) Act, 1877, and by the High Court of Justice in England under the original English Order LV., r. 1.

But if a judge exercises his discretion contrary to well-established principles or settled and defined rules of practice, "a question of law" is, in my opinion, involved, and the decision may be the subject of an appeal. Under the 22nd section of the Pur-

chase of Land Act, 1885, an appeal lies to the Court of Appeal only on *a question of law*, and the decision of the Court of Appeal in *Re Pentland's Estate* (1)—a case relating to the redemption of a fee-farm rent—shows that the exercise of a discretionary power might properly be made the subject of an appeal, and is therefore to be considered a question of law.

I think, therefore, that if it is alleged that the costs were withheld contrary to established principles, a question of law arises which any person interested in can require the Judicial Commissioner to hear and determine.

The facts in the present case are simple and free from controversy. The lands of Kilderry, Powerfield, and Kilanily, portion of the estate of Lord Leconfield, the vendor in this matter, were subject to an impropriate tithe rentcharge of £10 15*s.* 6*d.* payable to the trustees of Lord Southwell, and with the object of carrying out a sale of the fee in these lands to the occupying tenants, free from all outgoings, an application was made on behalf of the vendor under the 15th section of the Land Law (Ireland) Act, 1887, to redeem the tithe rentcharge. Before any order was made upon this application the trustees of Lord Southwell's estate applied that they should be declared entitled to the costs of investigating and making title to the tithe rentcharge proposed to be redeemed, and drawing out of Court the redemption price thereof.

These applications having come on before Mr. Commissioner Lynch, the price or sum at which the tithe rentcharge should be redeemed was fixed, in accordance with the usual practice of the Commissioners, at 20 years' purchase after deducting the average poor rate payable during the preceding five years; and by an order dated the 2nd July, 1890, it was ordered that as soon as any of the advances in respect of the sales of the lands thereinafter mentioned had been made, the impropriate tithe rentcharge in question should be redeemed at the price or sum of £199 1*s.* 8*d.* (being the price ascertained as before mentioned), and that thereupon the said sum should be paid into the Bank of Ireland, to the account of the Irish Land Commission, to the credit of this matter, and the separate credit of "redemption price of impropriate tithe rentcharge, £10 15*s.* 6*d.*, payable out of the lands of Kilderry, Power-

(1) 22 L. R. (Ir.) 649, and *ante*, p. 17.

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field, and Kilanily, in the barony of Small, county and city of Limerick, heretofore paid to Lord Southwell's trustees;" and after declaring the trustees entitled to the costs of and incident to this order, it was ordered that the application of the trustees for costs in respect of making title to the said impropriate rentcharge and drawing out the redemption price should be refused. From the latter portion of this order an appeal was taken to the Court of Appeal, when the order of the 5th August, 1890, already referred to, was made.

In pursuance of the order of the 2nd July, 1890, the sum of £199 1*s.* 8*d.* (being, as before mentioned, 20 years' purchase of the net annual amount of the tithe rentcharge) was, in accordance with the 73rd Rule lodged in the Bank of Ireland to the separate credit directed by the order, and no steps have yet been taken to obtain payment of the moneys so lodged. From the affidavits made on behalf of the trustees of Lord Southwell's estate in support of their application to Mr. Commissioner Lynch, it appeared that the title to the tithe rentcharge in question had not recently been investigated, and that the deduction of title would probably be troublesome and expensive. In the argument before me it was contended on behalf of the trustees that they were entitled to be indemnified against the costs and expenses referred to in the requisition, both on the general principles applicable to cases of compulsory purchase and also on the special principles to be deduced from the provisions of the Irish Land Acts, dealing with sales to tenants, and the Settled Land Act, 1882; and one of the counsel went so far as to maintain that the sections of the Lands Clauses Consolidation Acts relating to costs were, by implication, incorporated with the Purchase of Land (Ireland) Act, 1885. I cannot see any foundation, however, for this last contention, nor do I think the incorporation of certain provisions of the Lands Clauses Consolidation Acts in the 25th section of the Land Law (Ireland) Act, 1881, has any bearing on the subject now before me. The cases cited by Mr. Richards were, however, extremely valuable as showing that in cases of compulsory purchase, when the right to costs is merely a creature of statute, and no discretion exists in granting or withholding them, Courts of Equity in England have considered themselves justified in giving a beneficent

construction to the language of the statutes, under which the compulsory powers were exercisable, for the purpose of entitling a party to costs who, though within the spirit of the statute, was, nevertheless, not within the letter.

On the part of the vendor, Lord Leconfield, reliance was chiefly placed on the practice of the Commissioners, and it was stated that hitherto the costs of making title and drawing out the redemption price had never been given in cases of the redemption of tithe rentcharges. This argument, however, was considerably weakened by the admission that, until the present case, the question as to the right of the owner of the tithe rentcharge to such costs in the event of redemption, had never been discussed or raised.

The question must therefore be determined, not by the provisions of any statute nor by the practice of the Land Commission, but by the principles applicable to cases of this nature, where a judicial discretion as to awarding costs exists.

The case of *In re Bethlem Hospital* (1) and other cases appear to me to establish that where any discretion exists as to costs, a party whose property is taken compulsorily is entitled to be indemnified against any costs, properly and necessarily incurred by him, including the costs of obtaining payment of the purchase money or compensation awarded in respect of such property. This right, in my opinion, is founded on principles both just and reasonable.

In the present case the redemption of the tithe rentcharge has been directed solely for the benefit or convenience of the landowner, who is the vendor, and the tenants, who are the purchasers, and not for the advantage of the owner of the tithe rentcharge. In fact, in cases in which the tithe rentcharge is in settlement, its redemption will necessarily lead to a loss of income on the part of the owner of the tithe rentcharge, as the redemption money cannot be invested in any authorised securities that would produce an income equal to the amount of the tithe rentcharge. Is it then just that the trustees of Lord Southwell's estates should not only receive a diminished income, while the fund representing the

(1) L. R. 19 Eq. 457.

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redemption price of the tithe rentcharge is invested as at present, but that they (or whoever the owners of the tithe rentcharge may be) should bear the costs of any application for payment out of the fund, and of showing title to support that application? In my opinion it is not.

I have carefully read the judgment of Mr. Commissioner Lynch, and I gather that the principal reasons that led him to refuse these costs to the applicants were—1st, the hardship to the landowner in having to bear these costs in addition to redeeming the tithe rentcharge at a higher rate of purchase than he was getting from his tenants for the lands sold; and 2nd, the great practical difficulty in making provisions for a claim of this nature, indefinite in amount. But these considerations of hardship and inconvenience, which could not fail to impress me strongly, are not, in my opinion, sufficient to deprive the owners of the tithe rentcharge of the right which they would otherwise have. It is not suggested that there are any special circumstances in the present case that would disentitle them to the costs, and under these circumstances I think provision should be made for their payment. In answer to the requisition I shall declare that the owners of the tithe rentcharge are entitled to the costs and expenses properly and necessarily incurred in obtaining payment of the redemption price of the tithe rentcharge, including the costs of making title thereto for that purpose (1).

I have used the expression "the owners of the tithe rentcharge" instead of "the trustees of the estates of Viscount Southwell," because at present there is no evidence before me to show who are the persons entitled. I have omitted the words "as in other cases of compulsory purchase" to be found in the requisition, because I do not wish it to be assumed that the costs will be similar to those payable under the provisions of the Lands Clauses Consolidation Acts. The persons entitled to receive payment of the redemption price of the tithe rentcharge will be entitled to the costs of the

(1) As to making title to the redemption money of rentcharges the practice is now as follows:—An application is made, grounded upon an affidavit, setting forth concisely and accurately the title and the particulars of all incumbrances affecting the claimants interests. The Commissioner will then either make an order for payment or give such further directions as may be necessary.—*Vide* Rule 69 of the General Rules of Court of the 15th of August, 1891.

application for payment, and to the costs of making out such titles as will justify the payment to them.

Order accordingly.

Bewley, J.

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Feb. 2.

In re LORD LECONFIELD'S ESTATE.

Solicitors for the owners of the tithe rentcharge: *Messrs. O'Hagan and Son.*

Solicitors for the vendor: *Messrs. M'Mahon and Tweedy.*

THE IRISH LAND COMMISSION *v.* MAQUAY, by Original Action; and MAQUAY *v.* THE IRISH LAND COMMISSION, by Counterclaim.

Palles, C.B.

1891.
May 14.

IRISH LAND COMMISSION *v.* MAQUAY.

(XXVIII. L. R. I., p. 342.)

Sale by Land Commission in default of payment of instalments—Conditions of sale—Construction—Rights of purchaser as to possession.

The tenant purchaser of a holding under the Land Purchase Acts having allowed the instalments to fall into arrear, the Irish Land Commission set up the farm for sale by auction subject to conditions of sale in which the vendors were described as being "the Irish Land Commission," and under which the lands were to be sold subject to the annuity, and immediate possession was to be given to the purchaser upon completion of the purchase upon the prescribed day; the purchaser, paying his purchase money, was as from that date to be let into possession.

The conditions further provided that, as the vendors were selling under their power of sale, the purchaser should not require the concurrence of any other person. The farm was sold, and a conveyance executed to the purchaser, but the tenant, who was confined to bed from illness in a house on the farm, refused to give up possession or to attorn to the purchaser. The purchaser thereupon obtained from the Land Commission a writ of injunction to put him into possession; and the sheriff, having regard to the condition of the tenant's health, refused to put her out of the house, but offered to give possession of the remainder of the holding to the purchaser. This offer was declined, and the sheriff made a special return. The purchaser accordingly never obtained possession, and in an action by the Land Commission for instalments he counterclaimed for breach of the condition entitling him to immediate possession:—

Held, that upon the true construction of the conditions the clauses as to giving possession did not constitute a contract on the part of the Land Commission, but amounted only to a true representation of what would be the legal rights of the purchaser enforceable under the Land Purchase Acts, and that therefore the counterclaim could not be sustained.

Palles, C.B.

1891.
May 14.

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CAUSE shown by the plaintiffs in the original action against entering the verdict for the defendant.

The action was brought to recover £62 16*s.*, being two half-yearly instalments of an annuity payable by the defendant under a deed of conveyance dated 15th July, 1889, and made between the plaintiffs and the defendant. The defendant by his defence admitted the plaintiffs' right to the sum sued for, but counter-claimed damages for not having been put into possession of the premises by the plaintiffs. The case was tried before Mr. Justice Gibson and a jury of the city of Dublin in the Hilary sittings, 1891. It was the common case of both parties at the trial that the defendant had, in 1886, sold to one Catherine Brien, under the provisions of the Land Purchase (Ireland) Act, 1885, a farm of lands in the county of Waterford held from him by the said Catherine Brien as tenant, the entire of the purchase money amounting to £1,570, being advanced by the Irish Land Commission, and that by indenture dated 27th October, 1886, the farm was conveyed to the said Catherine Brien, who covenanted therein to repay the said Commission the amount of the said advance by an annuity of £62 16*s.*, for 49 years from 1st May, 1886, payable in two equal half-yearly instalments on the 1st May and the 1st November in each year. Catherine Brien having allowed two half-yearly instalments of this annuity to remain unpaid, the plaintiffs, in exercise of the power of sale conferred upon them as mortgagees, put up the farm for sale by public auction on the 28th May, 1889, subject to printed particulars and conditions of sale, which, after giving the usual descriptive particulars of the premises and a short statement of the tenure as already given, stated as follows:—"The lands will be sold subject to the future payment of this annuity (£62 16*s.*). Immediate possession will be given to the purchaser."

The vendors were described as "The Irish Land Commission."

Condition No. 4 was as follows:—"The purchaser shall pay the remainder of his purchase money on the 11th day of June, 1889, to the said solicitor (1), at his office, 24 Upper Merrion-street, Dublin, at which time and place the purchase is to be completed,

(1) The solicitor to the Irish Land Commission.

and the purchaser paying his purchase money is, as from that day, to be let into possession." And condition 9 stated—"The vendors are selling under their powers of sale, and the purchaser shall not require the concurrence of any other person."

The form of acknowledgment to be signed by the purchaser at the auction appears in the judgment.

The defendant purchased the farm at the auction for £105, and immediately after the auction paid a deposit of 25 per cent., and on the 15th July, 1889, he paid the balance of the purchase money, and executed the deed of conveyance of that date. On the 24th July, 1889, the defendant's land agent attended at the lands and demanded possession of them from Catherine Brien, which she refused to give. On the 2nd August, 1889, the plaintiffs, on the application of the defendant, issued an injunction to the sheriff of the county of Waterford to put the defendant into possession of the lands. A long correspondence then ensued between the solicitor for the plaintiffs and the solicitor for the defendant and the sub-sheriff for the county of Waterford. On 29th December, 1889, the sheriff made a special return to the injunction. The substantial questions in dispute at the trial were whether or not possession had actually been given to the defendant, and whether or not he had agreed to waive his right to get possession.

On behalf of the defendant the following evidence was given in support of his counterclaim :—

Richard Kelly deposed that he was agent for the defendant, and that he knew the farm. The rent of the farm before the purchase was £105 a year, and the value of the holding was £100 a year over the said annuity of £62 16*s.* a year. Catherine Brien had two sons and two daughters, all adults, and all working on the farm. On the 24th July, 1889, witness went to the lands, and found Catherine Brien and her family in possession. He brought with him the deed of conveyance, and showed it to Mrs. Brien, and demanded possession, but she refused. He at once communicated her refusal to the defendant. On the 11th December, 1889, having already made an appointment, he went to the lands along with the sheriff, and they saw Mrs. Brien in bed. Her two daughters and one son were with her, and she had a doctor's certificate, dated 12th August,

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1889, certifying that she was unfit for removal. They refused to give up possession. Witness then offered to take possession if they would attorn, but they refused to attorn. Witness considered that the doctor's certificate was a sufficient answer to putting her out of possession, and he did not ask the sheriff to put her out. He did not go on the lands again till the 13th May, 1890, when by appointment, he accompanied the sheriff. He and the sheriff attended pursuant to a letter from the solicitor for the plaintiffs dated 5th May, 1890, which contained a suggestion that Mrs. Brien should be asked to sign a caretaker's agreement. Mrs. Brien was still bedridden, and she refused to sign the agreement. Witness did not since go on the lands. The farm could not properly be managed if Mrs. Brien and her family remained in possession. On cross-examination the witness deposed that he knew that Mrs. Brien was really suffering from illness, and that her illness was not a sham. The defendant intended to work the farm by a caretaker.

Mr. Pierce Kelly, solicitor for the defendant, proved that he acted for the defendant, and paid the balance of the purchase money some time before the conveyance was executed. He applied to the Land Commission and obtained an injunction to put the defendant into possession, and he sent it to the sheriff in a letter dated the 2nd August, 1889. He saw the sheriff frequently, and the sheriff told him he could not execute the injunction in consequence of the doctor's certificate. The sheriff called on witness the 3rd December, 1889, and arranged to take possession on the 11th December, provided he got a doctor's certificate that it would not be attended with any danger to Mrs. Brien's life, but not otherwise. On the 30th April, 1890, the defendant and witness called at the office of the Land Commission, and had an interview with Mr. Alexander, the plaintiff's solicitor. It was then arranged between the parties that the sheriff was to give possession at once to the defendant, leaving Mrs. Brien in the house provided she and one of her daughters signed a caretaker's agreement, and in the alternative that if she refused to do so, the defendant should accept possession without disturbing Mrs. Brien on being indemnified by the Land Commission against any liability for taking possession in this manner. In consequence of this interview the

plaintiff's solicitor wrote the letter of the 5th May, 1890, already referred to, and witness wrote a letter to the sheriff referring to the alternative course arranged on.

General J. P. Maquay, the defendant, deposed that he attended the auction and signed the conditions of sale. He corroborated the evidence of Mr. Pierce Kelly as to the interview with Mr. Alexander and the indemnity to be given. He knew that Mrs. Brien was very old and bedridden, and he was unwilling to take possession of the farm unless the house was cleared. Certain correspondence having been read in evidence, the defendant's case closed.

On behalf of the plaintiffs, the sub-sheriff for the County of Waterford was examined and deposed to visiting the lands along with Mr. P. Kelly for the purpose of executing the injunction on the 11th December, 1889, and on the 13th May, 1890. On the 11th December, 1889, he removed from the house Mrs. Brien's family and also the furniture, leaving Mrs. Brien, who was very ill, in her bed, and then he offered Mr. Kelly to give him partial possession of the house, leaving Mrs. Brien in her room, if he would accept it. Mr. Kelly refused, and witness then returned and made a return to the injunction. On the 13th May, 1890, he again removed the persons in occupation except Mrs. Brien, and also the furniture. On that occasion Mrs. Brien refused to sign the caretaker's agreement, and witness again offered to give Mr. Kelly partial possession of the house, leaving Mrs. Brien in her room, but he refused to take it. The plaintiff's case then closed. It was then agreed that the compensation, if any, to which the defendant was entitled under the counter-claim should be measured at the same rate as the instalments payable to the Land Commission so as to set off one against the other.

Counsel for the plaintiffs then applied to his Lordship to direct a verdict for them on the following grounds:—1. That possession under the contract meant possession subject to Mrs. Brien's occupation: *Lake* v. *Dean* (1), and *Carroll* v. *Keayes* (2); 2, that the contract merged in the conveyance; 3, that the contract was satisfied when the injunction issued to the defendant's solicitor on

(1) 28 Beav., 607. (2) Ir. R., 8 Eq., 97.

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his application; 4, that the defendant was only entitled to nominal damages from the 16th September, 1889; 5, that inasmuch as the sheriff, on the 11th December, 1889, and 13th May, 1890, offered legal possession to the defendant, the defendant was not entitled to damages after that date. Counsel for the defendant applied to his Lordship for a direction in his favour.

His Lordship, without expressing any opinion on the questions of law raised, directed a verdict against the counterclaim, and judgment to be entered for the plaintiffs in the original action for the amount sued for, reserving leave to the defendant to move to enter a verdict and judgment on the counterclaim for such amount as the Court might direct, the Court to be at liberty to draw inferences of fact.

The defendant having obtained a conditional order, the plaintiffs showed cause.

Mr. Wright, Q.C. (with him *The Solicitor-General*, and *Mr. Bushe*), for the plaintiffs, showed cause:—

When a holding is sold by the Land Commission the Land Commission may, on the application of the purchaser, issue an order to the sheriff to put the purchaser into possession: Land Law (Ireland) Act, 1887, sect. 21, Rule 79, and Forms Nos. 39 and 40 (1). Assuming that the Land Commission were bound under the conditions of sale to give the purchaser immediate possession, the rights of the parties must now depend, not on the conditions of sale, but on the provisions of the deed of conveyance. In other words, the contract entered into on the conditions of sale become merged in the deed of conveyance: *Leggett* v. *Barrett* (2), and *Palmer* v. *Johnson* (3). There is no provision in the deed of conveyance obliging the Land Commission to put the purchaser into immediate possession. The purchaser, therefore, was obliged to apply under sect. 21 for the order directed to the sheriff. On his own application he obtained that order and placed it in the hands of the sheriff. The sheriff twice proceeded to execute it, accompanied by the defendant's agent. But it clearly appears from the evidence that it was owing to the interference of the defendant and his agent that the sheriff did not execute the order. The

(1) Rules of Court dated 20th January, 1890.
(2) 15 Ch. Div., 306.
(3) 13 Q. B Div., 351, 357.

sheriff offered to give defendant partial possession of the house, leaving Mrs. Brien still in possession of her room, but the defendant by his agent refused. The sheriff could have given partial possession: *Ulster Bank* v. *Woolsey* (1). [Counsel also cited *Jones* v. *Chapman* (2)]. The subsequent conduct of the defendant showed that it was owing to his own interference with the sheriff that the eviction was not carried out. It would be impossible to hold the Land Commission liable for what was really the act and default of the defendant.

But a more important question is: What is the true construction of the words of the conditions of sale? The words "immediate possession will be given to the purchaser" are not words of contract, but words simply amounting to a statement of the statutory rights of the purchaser. Under these circumstances the defendant cannot sustain his counterclaim for damages for breach of contract. The defendant must be fixed with knowledge of the statutory provisions affecting his right as purchaser.

Mr. Overend, Q.C. (with him *The Right Hon. S. Walker, Q.C.*, and *Mr. Cherry*), for the defendant: —

The Land Commission are a body vested with varied powers, judicial and otherwise. They possess important powers as to the acquisition by them of lands, and also their re-sale: *vide* 44 & 45 Vict., c. 49, part v. By sect. 30, sub-sect. 2 of that Act, the Land Commission are empowered to sell any holding by public auction and subject to any conditions of sale they may think expedient (see also section 18 of the Land Law (Ireland) Act, 1887). This, therefore, is a case of vendor and purchaser, and the purchaser is entitled to damages for any defect or misrepresentation in the conditions of sale. *Phelps* v. *White* (3), and *In re Turner and Skelton* (4), *Palmer* v. *Johnson* (5), already cited, is really an authority in favour of the defendant. The words of the conditions of sale are words of contract, and not words of representation. The Land Commission by their conditions have bound themselves to give immediate possession, and not having done so, they are liable in damages.

(1) 24 Ir. L. T. Rep., 65.
(2) 2 Exch., 803.
(3) 7 L. R., Ir., 161.
(4) 13 Ch. Div., 130.
(5) 13 Q. B. Div., 351.

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The Solicitor-General, in reply, cited *Caballero* v. *Henty* (1), *Ford* v. *Cotesworth* (2), *Appleby* v. *Myers* (3), and *Chitty on Contracts*, pp. 728–9.

PALLES, J.:—

Many questions have been argued in this case, some of which are of much interest and difficulty; but in the view which I take of the case it is unnecessary that I should express an opinion upon any of them except one—viz., what is the true meaning of the contract in question? I myself do not entertain any doubt that, having regard to the various powers which have been conferred by statute on the Land Commission, it had full power to enter, as a contracting party, into the contract contained in the document which has been signed, whatever may be the true meaning of that document. At the same time, when I come to consider the terms of the contract, I cannot leave altogether out of consideration that the Land Commission is a body of a very peculiar nature. It has, *inter alia*, two classes of functions. One is to sell lands, and for that purpose to enter into proper contracts and execute conveyances. Another class of functions is of a judicial character; and by the express terms of the Act of 1887 includes judicial acts in relation to matters as to which it previously may have acted as a contracting party. The result, no doubt, is a strange one; but it is impossible, on the construction of the Act of 1887, to escape from the conclusion, that they may at one time enter into a contract for the sale of lands and carry it out by conveyance, and at another, act judicially in relation to the rights of the parties which arise out of their own conveyance.

I, however, must take the contract as I have it here, and I proceed to apply as best I can the ordinary rules of construction to the words which have been used. It commences by stating that this farm is to be sold by public auction by instructions of the Irish Land Commission; and if we turn to the second page of the "Conditions of Sale" we find "the vendors are selling under their powers of sale, and the purchaser shall not require the concurrence of any other person." Thus both parties to the contract deal

(1) L. R. 9 Ch., App., 447.
(2) L. R., 5 Q. B. B., 544.
(3) L. R., 2 C. P., 651.

with each other, with the knowledge that this is to be a sale by the Land Commission under the powers of sale given to them, and which sale must therefore be carried out under the provisions of the code of Acts which incorporate the Commission and confer their powers upon them.

Now that being so, what is the property that this body has contracted to sell? It is described as follows:—"Tenure—By conveyance dated 27th October, 1886, John Popham Maquay, William H. P. Maquay, and G. D. Maquay conveyed the above lands in fee to Catherine Brien, and by said deed the said Catherine Brien conveyed said lands to the Irish Land Commission in fee simple subject to redemption, and thereby covenanted to pay the Commission an annuity of £62 16*s.* for 49 years from the 1st November, 1886, payable half-yearly, on every 1st day of May and 1st day of November. The lands will be sold subject to the future payment of this annuity.

This description tells us that this was not a portion of land which had with others been bought by the Land Commission under the ample powers to which Mr. Overend referred us yesterday, but that it was land which they had acquired under the provisions of the Ashbourne Acts by advancing a sum of money to the tenant and taking an annuity, as required by those Acts, for a certain number of years, of which 47 were unexpired at the time of the sale.

The next statement which is contained in the first page of the document are the words upon which the question in this case turns—"immediate possession will be given to the purchaser." That tells us, what we would have implied from the previous statement, that what is sold is not only a fee simple but a fee simple in possession. But I quite agree that it goes beyond that. I agree that it amounts to a statement—its nature I shall afterwards consider—but it amounts to a statement that immediate possession will be given to the purchaser. In my opinion, the whole question in this case is whether that statement is to be deemed a contract or a representation? We all know that in dealing with a contract in writing it is the province of the Court to determine whether any particular statement in it is matter of contract or representation, and that the rights of the parties are

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different according to the statements being of one class or the other. We also know this (and if there were any doubt upon it I might refer to the case of *Behn* v. *Burness* (1), which was a decision of the Court of Error in England), that that which under one set of circumstances *dehors* the contract might amount to a contract, may under another set of circumstances amount to a representation only, so that the question must be decided, not alone upon the terms of the written document, but upon such circumstances *dehors* the contract known to both parties at the time it was entered into as according to the general rules of construction are fit to be referred to on the question of interpretation.

I shall first read the words of the contract itself. "I, General J. P. Maqnay, hereby acknowledge that on the sale by auction this 28th day of May, 1889, of the property mentioned in the foregoing particulars, I was the highest bidder, and was declared the purchaser thereof, subject to the foregoing conditions, at the price of £105, and that I have paid the sum of £26 5*s.* by way of deposit in part payment of the purchase money, and I hereby agree with the Irish Land Commission, the vendors, to pay to them the remainder of the said purchase money and complete the said purchase according to the aforesaid conditions."

I think it material to observe that that document divides the preceding printed matter into two different divisions, and deals with them differently—first we have what is called in the contract "the foregoing particulars," and as page 1 of the print is headed "Particulars and Conditions of Sale," and pages 2 and 3, "Conditions of Sale," I infer that these foregoing particulars consists of everything upon page 1. The second division is the "Conditions of Sale." It will be observed that the "Particulars" are referred to in this contract for the purpose only of describing the subject matter of the sale, and that the "Conditions of Sale" are referred to as those upon which the sale is to be made, or, in other words, as the terms of the contract. I do not wish to be understood as saying that there may not be statements in the "Particulars" as distinguished from the "Conditions of Sale," which may not be such as the Court may construe as amounting to a contract. But

(1) 3 B. & S. 751.

prima facie the contract is—"We refer to the particulars for the purpose of making certain the thing sold, and that thing so sold one of us sells and the other purchases upon the terms and conditions contained in the Conditions of Sale." The reason I make this distinction between these different portions of the printed matter is, that if we find, as possibly we may, something not exactly similar in the conditions of sale and in the particulars, some variance between them, it appears to me that in determining this question of contract the conditions must prevail, and that that consideration will assist us in arriving at a conclusion whether the words in question amount to a contract or constitute a representation only.

Having said so much, let me refer again to the words that are in controversy—"immediate possession will be given to the purchaser." Now even in a contract between party and party these words would leave something to be implied—it at least implies that there should be a demand. I apprehend that on an agreement out of Court between party and party upon particulars such as these, the obligation upon the vendor to give possession to the purchaser would not arise until he demanded possession. There must, therefore, be some implication in order fully to understand the meaning of the words. Now is the reasonable implication to be drawn, "immediate possession will be given to the purchaser *upon demand*," or is it, "immediate possession will be given to the purchaser *according to the course of the Land Commission*." It must be remembered that the provision in the 21st section of the Act of 1887, authorising the Land Commission to issue an injunction to put the purchaser into possession, is one, knowledge of which must be imputed to the purchaser. Under the provisions of the Act of Parliament the purchaser is not entitled to possession at once, as in an ordinary case; he must demand it; but the distinction between an ordinary case and a case under this Act appears to me to be this, that in an ordinary case the requisite demand would be a demand on the lands, or a demand from the vendor who contracted to give possession; but where the sale is under the Act of 1887 the demand contemplated must be one of some other character, as, from facts within the knowledge of both parties, a demand on the lands, as upon an

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ordinary sale, would probably be futile, and the mode of making a demand upon the vendors is regulated by statute. The sale is by the Land Commission of lands which both parties know are in the possession of another person: the only effective demand would be a demand that could be followed by enforcement. That enforcement could be effected only by a writ directed to the sheriff under the 21st section of the Act, and that writ could be obtained only upon the election and application of the purchaser.

Mr. Justice Murphy asked Mr. Walker, during the argument, whether this counterclaim could have been sustained if General Maquay had not applied to the Land Commission for an injunction, and the necessity of Mr. Walker's argument involved the result—which, with his usual lucidity and candour, he at once admitted—that he was driven to argue that even in that case the claim could have been sustained. Look then at the position in which the Land Commission would have been. It could not have acted under the 21st section, save upon the application of the purchaser; but the purchaser *ex hypothesi* not being under any obligation to apply, the Land Commission might have remained year after year out of possession of the lands, and liable to damages, although the omission to give possession would have been caused by General Maquay not applying, and not being bound to apply under section 21. In my opinion that involves upon its face an absurdity, and I, therefore, have arrived at the conclusion, that having regard to the sale being one not by an ordinary vendor, but by a commission incorporated by statute for a special purpose, and having statutable powers in relation to the very subject matter of this clause—*i.e.*, giving possession to a purchaser—these words, "immediate possession will be given to the purchaser," mean, upon the true construction of the contract, that such possession will be given, not upon request or demand, but "*by means of an injunction to be granted under the* 21*st section upon the application of the purchaser.*" Reading the words that way am I to treat them as words of contract, or words of representation. Had the words been "Immediately after the execution of the conveyance, the purchaser will be entitled to apply to the Land Commission for an injunction to put him in possession of the land," it would be out of the question to construe them as words

of contract, or as anything else than a statement, and a correct statement, by the Land Commission of the rights which the law gives to a purchaser under the special legislation under which they were acting, and if the words so expressed would amount to a representation only, so must also the words here, which in my opinion mean the same thing. The added words, although not expressed, are arrived at by clear implication only, and the rule of law as to the meaning of words is the same whether they are expressed or implied.

A confirmation of this view is afforded by the distinction which I have already alluded to, which is drawn by the contract between the particulars on the one side and the conditions of sale on the other. There is a condition of sale applicable to this matter of possession—"The purchaser shall pay the remainder of his purchase money on the 11th day of June, 1889, to the said solicitor at his office, 24 Upper Merrion-street, Dublin, at which time and place the purchase is to be completed, and the purchaser paying his purchase money, is *as from* that day to be let into possession." It is not "is *upon*" but "*as from* that day." The latter are words of relation usually employed in reference to rights as to rents and such matters, and do not necessarily involve an actual physical change of possession upon the day in question, and in my view the inconsistency, although it may be a small one, between the particulars of sale and this condition can be best, and indeed can only be, reconciled upon the true principles of construction, by holding the statement in the particulars to be a description of the rights of the purchaser after the execution of the conveyance, and the contract as to possession to be that contained in the conditions of sale.

That is the view of the case upon which I base my judgment, and I do not go into many of the other matters which were mentioned in the argument; but there is one point at which I wish to glance for a moment. The only way, or rather the easiest way by which the argument I have suggested can be met, is by saying that the Land Commission had the ordinary powers of mortgagees to recover possession of the land, and that the words, "immediate possession will be given to the purchaser," express a contract upon their part that they would exercise their rights to

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recover by ejectment, and that having recovered possession by ejectment or otherwise, they would give possession to the purchaser. But I am of opinion that on the true construction of these conditions of sale no intention that the lands should be recovered by ejectment can be imputed, and for this reason—the purchaser was to get possession either on or as from 11th June. The sale was made on the 28th of May. Both parties knew that the old lady was in possession. I attribute to General Maquay the knowledge that she was bed-ridden—whether to the extent that it would be impossible to remove her, I do not care to inquire—but I impute to him a knowledge that she was bed-ridden. Having that knowledge it is impossible to imply a contract by the mortgagees that they would procure this lady to quit voluntarily, and I am satisfied that the possibility of her being evicted between the 28th of May and the 11th of June was not present to the mind of either party. But supposing it was, the mortgagees could evict her only by virtue of their legal estate. They parted with their legal estate by their conveyance to General Maquay, and therefore gave to him and he accepted from them, that without which they could not acquire or give possession otherwise than under their own special powers, and in that view General Maquay's acceptance of the conveyance would have amounted to a waiver of the condition. I prefer, however, to rely on this, not as in strictness a waiver of the condition, but rather as showing that both parties contemplated that possession should be given not by the voluntary act of the old lady, through the medium of an ejectment, but solely under the provisions of the Act of 1887.

In my opinion the conditional order should be discharged with costs, and the verdict had for the Land Commission should stand.

ANDREWS and MURPHY, JJ., concurred.

Solicitor for the plaintiffs: *Mr. W. Alexander.*
Solicitor for the defendant: *Mr. Pierce Kelly.*

In re ROBERT MAXWELL'S ESTATE.

XXVIII. L. R. I., p. 356.

Bewley, J.

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In re MAXWELL'S ESTATE.

Redemption of quit rent—Nullum Tempus (Ireland) Acts, 48 *Geo.* 3, *c.* 47; 39 & 40 *Vic.*, *c.* 37—*Rents "put in charge," meaning of.*

Quit rent payable to the Crown, and entered in the Crown Rental at the time of its creation, which has not been received for over sixty years is not barred by 48 Geo. 3, c. 47, being a rent "duly in charge" within sec. 1 of that Act, and 39 & 40 Vict., c. 37, s. 1, does not apply to a claim by the Crown to the arrears of such a rent.

Attorney-General v. *Lord Eardley* (1) followed. *Tuthill* v. *Rogers* (2) considered.

APPLICATION on behalf of the Commissioners of Woods, Forests, and Land Revenues that the following question of law, as stated on a requisition lodged the 2nd day of February, 1891, should be determined by the Judicial Commissioners, sitting with the Commissioners appointed under the Purchase of Land (Ireland) Act, 1885, pursuant to the 17th sec. of the said Act—namely, "Whether the yearly quit rents of £1 1*s.* 3½*d.* and 11*s.* 10½*d.*, mentioned at No. 2 in the Schedule of Incumbrances in this matter, and claimed as being payable to Her Majesty, are rendered legally irrecoverable by the provisions of the Acts 48 Geo. 3. cap. 47, and 39 & 40 Vict., c. 37, the said rents not having been in receipt within the last 60 years."

The *Solicitor-General* (*John Atkinson, Q.C.*), and *Thomas J. Wall* for the Commissioners of Woods and Forests and Land Revenues.

Mr. George Price, Q.C., for the vendor.

The facts and arguments of counsel are stated in the judgment.

BEWLEY, J.:—

In this case the Commissioners of Her Majesty's Woods, Forests, and Land Revenues seek a declaration that the yearly quit rents of £1 1*s.* 3½*d.* and 11*s.* 10¼*d.*, mentioned at No. 2 in the schedule of incumbrances in this matter, and claimed as being

(1) 8 Price 39. (2) 1 J. & L. 36

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payable to Her Majesty are not rendered legally irrecoverable by the provisions of the Acts 48 Geo. 3, c. 47, and 39 & 40 Vict., c. 37, the said rents not having been in receipt within the last sixty years.

The case is one of considerable importance, because it involves not only the question as to the right of the Crown to recover upwards of 170 years' arrears of quit rent in the present case, but also the general question as to whether quit rents come within the provisions of the *Nullum Tempus* Acts, 48 Geo. 3, c. 47, and 39 & 40 Vict., c. 37.

Before the argument was entered on I suggested that this question would be most properly decided in the Exchequer Division, and that the proceedings in this matter might stand over until the decision had been obtained, but the parties were unwilling to adopt this course, which would occasion delay and expense, and, as they were entitled to do, required me to give my opinion on the question submitted to me.

The rent of £1 1*s.* 3½*d.*, referred to in the requisition, was created by letters patent dated the 18th July, 1669 (22 Car., II.), by which the Crown granted to one Elra Palmer, a purchaser from certain adventurers therein mentioned, certain lands forfeited in the rebellion of 1641, including, *inter alia*, "in the town and lands of Ballyglasse, with the appurtenances, 76 acres profitable land lying and being in the Barony of Clanwilliam, in the County of Tipperary," to hold unto and to the use of the said Elra Palmer, his heirs and assigns for ever, in free and common socage, yielding and paying thereout the yearly rent of £1 3*s.* 0¾*d.* of the late currency of Ireland. The title to the other rent of 11*s.* 10¼*d.* has not been stated, but I assume that it had its origin in a similar grant.

That these rents are rents service cannot of course be questioned. The Crown did not come within the operation of the statute *Quia Emptores* (18 Ed. I., c. 1), and such rents do not cease to have the character and incidents of rents service, because they are small in amount.

A *quit rent* is not necessarily a rent payable to the Crown, and, strictly speaking, means a rent payable to the lord, when the tenant goes *quit* and *free* of all other services, but in Ireland this

term is usually applied to those acreable rents which were reserved in Crown grants in fee-simple of lands forfeited in the rebellion of 1641. The quit-rents in the present case appear to have been unpaid for a very considerable time, and the following return has been made in respect of them by the Quit Rent Office:—"The lands of Ballyglass Upper are charged with the following quit-rents, &c.:—6*s.* 1*d.*, late Irish currency, £1 1*s.* 3½*d.*, British currency; 11*s.* 10¼*d.*, British currency. The rent of 6*s.* 1*d.* was discharged by order of the Exchequer and the remaining two rents appear in the insolvent arrears, but which consist of rents now more than 170 years in arrear."

No payment having been made on foot of these two rents for upwards of 60 years, it has been contended on the part of Mr. Robert James Maxwell, the owner of the lands of Ballyglass, that the right of the Crown is now barred by the 48 Geo. III., c. 47.

It becomes necessary, therefore, to consider some of the material provisions of that statute, which according to its title is an Act for quieting possessions and confirming defective titles in Ireland.

Section 1 enacts as follows:—"The King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politick or corporate, in Ireland for or in anywise concerning any manors, lands, tenements, rents, tythes, or hereditaments whatsoever (other than liberties or franchises), or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand of, in, or to the same or any of them by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue or grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, heirs, or successors, or some other person or persons, bodies politick or corporate, under whom his Majesty, his heirs, or successors, anything hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been in the actual seism thereof, or have or shall have been answered by force, and virtue of any right or title to the same,

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the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honors, manors, or other hereditaments whereof the premises in question shall be part or parcel within the said space of sixty years, or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, within the said space of sixty years, and that all and every person or persons, bodies politick and corporate, their heirs and assigns, and all claiming by, from, or under them, or any of them for and according to their and every of their several estates and interests which they have or claim to have, or shall or may have, or claim to have in the same respectively, shall at all times hereafter quietly and freely have, hold, and enjoy against his Majesty, his heirs, and successors claiming by any title which hath not first accrued or grown, or which shall not hereafter first accrue or grow within the said space of sixty years, all and singular manors, lands, tenements, rents, tythes, and hereditaments whatsoever (except liberties and franchises) which he or they, or his or their, or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, or shall have held, or enjoyed, or taken the rents, revenues, issues, or profits thereof by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, unless his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or some other person or persons, bodies politick or corporate, by, from, or under whom his Majesty, his heirs, or successors, anything hath or lawfully claimeth, or shall have or lawfully claim in the said manors, lands, tenements, rents, tythes, or hereditaments, by force of any right or title have, or shall have been in the actual seisin thereof, or have been, or shall have been answered by virtue of any such right or title, the rents, revenues, issues, or other profits thereof within the said space of sixty years, or that the same have, or shall have been duly in charge, as aforesaid, within the said space of sixty years."

This section has two distinct objects—*first*, to fix a limitation of the right of the Crown to sue in respect of the property

mentioned, and, *second*, to secure to the subject for ever the property, the rights of the Crown to which have been barred. The first clause of the section prescribes a period of limitation of sixty years, and bars the remedy of the Crown; but this general enactment is qualified by three exceptions or savings, which it will be necessary for me to refer to more particularly afterwards.

On behalf of the Crown it is submitted that quit rents are not "rents" within the meaning of the section of the statute, and it is argued that this is the effect of the decision in *Tuthill* v. *Rogers* (1), a case of the very highest authority, decided by Sir Edward Sugden as Lord Chancellor of Ireland, and Mr. Blackburne as Master of the Rolls. It will be found, however, that this case did not decide the general proposition contended for. The facts were shortly these:—By letters patent, bearing date the 5th January, in the thirty-first year of the reign of King Charles II., the lands of Higginstown, in the county of Meath, were granted to Sir Gerald Aylmer and the heirs male of his body, reserving to the Crown the yearly rent of £4 18*s*. 5½*d*., which was equal in amount to the quit rent, which would have been payable in respect of these lands, if they had been granted in fee. The reserved rent was thereupon put in charge in the Crown rentals as if it were a quit rent, and so continued to the hearing of the case in 1844. In 1776 the estate in tail determined by the failure of the issue male of Sir Gerald Aylmer, and from that time the persons deriving under the patentee continued in possession of the lands, claiming them as their estate in fee-simple, and paying the rent of £4 18*s*. 5½*d*. as quit rent. The lands having been decreed to be sold, it was held by the Lord Chancellor, assisted by the Master of the Rolls, upon an exception taken by a purchaser to a report of good title, that the title of the Crown was barred and transferred to the vendor by the operation of the 48th Geo. III., c. 47.

In arriving at this conclusion, it was held that the payment of the yearly rent of £4 18*s*. 5½*d*. after the determination of the estate tail was not an answering to the Crown by force of any right or title to the same—"the rents, revenues, issues, or profits of the lands" within the meaning of the second saving of sec. 1,

(1) 1 J. & La T. 36; 6 Ir. Eq. R. 129.

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on the ground, *inter alia*, that "rents, issues, and profits" mean the general profits of the estate.

No question arose in that case as to the meaning of the word "rents" in the earlier clause of the section limiting the right of the Crown to sue for the recovery of manors, lands, tenements, rents, tithes, or hereditaments, where the title of the Crown has not accrued within sixty years before the commencement of the suit, and the decision merely amounts to this—that in the second saving, where the Crown shall have been answered by force and virtue of any right or title to the same, "the rents, revenues, issues, or profits" of the lands within sixty years, the words refer to the general profits of the estate, and "rents" must be construed to mean such rents as are equivalent for issues and profits.

I cannot, therefore, find anything in *Tuthill* v. *Rogers* (1) that would warrant me in holding that the "rents" referred to in the earlier clause would not include quit rents; nor, having regard to the language of the clause which deals with proceedings taken for or concerning any manors, lands, tenements, rents, tithes, or hereditaments, or for or in anywise concerning the revenues, issues, or profits thereof, do I think that the section, so far as rents are concerned, can be confined to the recovery of rent as an inheritance—*i.e.*, an estate in rent and not applied to the recovery of rent as a chattel.

But the important question now arises whether, even though quit rents would be included in the general enactments in the beginning of sec. 11, the rights of the Crown may not be preserved by one or other of the three exceptions which follow. The first exception arises where the Crown has been in the actual seisin within the sixty years. This clause does not exist in the 9 Geo. 3, c. 16, the English *Nullum Tempus* Act, corresponding with the 48 Geo. 3, c. 47, and as two such eminent judges as Lord St. Leonards and Lord Chancellor Blackburne could not agree as to its meaning and effect, I do not feel called on at present to express any definite opinion on the subject. In *Tuthill* v. *Rogers* (1) Lord Chancellor Blackburne, then Master of the Rolls, held that "actual seisin" in this clause meant actual possession, and Lord

(1) 1 J. & La T. 36; 6 Ir. Eq. Rep. 429.

St. Leonards, without laying down affirmatively what was actual seisin, contented himself with declaring that the case before him was not one in which the Crown could be deemed to be in the actual seisin of the land within the meaning of these words. I may observe that there would appear to be great difficulty in holding that the Crown had ceased to be in "the actual seisin" of a quit or Crown rent because it had fallen into arrear.

The second saving has no application to the present case, as there is no pretence that the Crown has been answered by force of its title, the rents, revenues, issues, or profits within a period of sixty years.

The third saving, however, is applicable if the rents in question have been duly in charge to her Majesty, her progenitors, predecessors, or ancestors, within the space of sixty years.

Rents payable to the Crown were formerly put in charge in one or other of two ways—viz., either by the Auditor-General, *ex-officio* from the King's grant, or by the Court of Exchequer upon a *scire facias* on behalf of the Crown. When, as in the present case, a grant of lands was made by the Crown to a subject the *fiat* of the Attorney- or Solicitor-General for the patent or grant was lodged in the Rolls Office, and when the grant was sealed and enrolled, it was not given directly to the party concerned, but was brought by one of the clerks in the Rolls Office to the Auditor-General to be entered by him. The Auditor-General having ascertained the rent, inserted it in the rolls of the King's rents, and the grant was then delivered to the party (1).

The great Roll of the Pipe was the principal record in the Exchequer, and the medium of charge and discharge of rents and debts due to the Crown, and in it the accounts of the ancient royal revenue were entered. Hence Lord Coke, in 3 Inst., 189, in his Commentary on the first *Nullum Tempus* Act, 21 Jas. I., c. 2, says:—"Duly in charge in judgment of law is the Roll of the Pipe: for, although a note before the auditor or any other may be a mean to bring it in question, and to be put in charge, yet that is not in judgment of law said to be 'duly in charge,' unless it be in charge in the Pipe."

(1) Howard's Exchequer and Revenue, pp. 47, 48.

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The 2nd sect. of 48 Geo. III., c. 47, already referred to, provides that "where the rents, revenues, issues, or profits of any manors, lands, tenements, tythes, or hereditaments are or shall be in charge by, to, or with any auditor or auditors, or proper officer or officers of the Revenue, such rents, revenues, issues, and profits shall be held deemed and taken to be duly in charge within the intent and meaning of this Act, any usage or custom to the contrary notwithstanding."

Rents were therefore held to be in charge when, in the rolls delivered to the receivers or auditors of the Crown or other collectors of the royal revenue, they were charged against them. And although these rents were not received or even demanded from the persons liable to pay them for a period of more than sixty years, they were nevertheless deemed to be duly in charge, and the claim of the Crown was protected, although the receivers, auditors, or collectors should return *nil*. This is the effect of the decision in *Attorney-General* v. *Lord Eardley* (1) following *Attorney-General* v. *Maxwell* (2), and though Lord St. Leonard's, in *Tuthill* v. *Rogers* (3) expressed a doubt as to the propriety of the decision, it must still, in my opinion, be considered as law. Chief Baron Joy was therefore perfectly accurate in stating in *Hatton* v. *Waddy* (4), that a quit rent was a charge which may be enforced after any period of time. "It is a charge which does not allow of a prescription to discharge it, and which, being vested in the Crown, is not barred by the Statute of Limitations." The quit rent which is there referred to is the rent so called in Ireland as already mentioned which had its origin in the grants made by the Crown to adventurers, soldiers, and others, of lands forfeited by the rebellion of 1641. Such grants, in accordance with the practice already mentioned, were transmitted to the Auditor-General to be entered by him before they were delivered to the grantee, and the quit rent reserved by the grant was therefore necessarily put in charge and remained in charge whether the rent was actually paid or not. Quit rents therefore would fall within the third saving in

(1) 8 Price 39.
(2) Ibid., p. 76 in notis.
(3) 1 J. & La T. 82.
(4) 2 Jones 841.

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section 1 of the 48 Geo. III., c. 47, unless they have been withdrawn from it by subsequent legislation.

The provisions of the 39 & 40 Vict., c. 37 (the *Nullum Tempus* (Ireland) Act, 1878), remain, however, to be considered. The first section of that Act is as follows:—"The Queen's Majesty, her heirs and successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever (other than liberties or franchises) which such person or persons, or his, or their, or any of their, ancestors or predecessors, or those from, by, or under whom they do, or shall, claim, have, or shall have held or enjoyed, or taken the rents, revenues, issues, or profits thereof by the space of 60 years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, by reason only that the same manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits thereof have, or shall have been, in charge to her Majesty, or her predecessors or successors, within the said 60 years; but that such having been in charge shall be as against such person or persons, and all claiming by, from, or under them, or any of them, of no force or effect."

Whatever may have been the intention of the framers of this Act, this section appears to me only to apply where the specific manors, lands, tenements, rents, tithes, or hereditaments, originally the property of the Crown, have been held or enjoyed by a subject for a period of 60 years—*i.e.*, in the case of a quit or Crown rent, where that rent has been wrongfully received by a subject for the statutory period. The language of the section, differing in that respect from that of the first section of the 48 Geo. 3, c. 47, deals with proceedings for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments (other than liberties or franchises), without adding the words "or for or in anywise concerning the revenues, issues, or profits thereof," and appears, so far as *rent* is concerned, to contemplate

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proceedings for the recovery of rent as an inheritance, and not the arrears of a rent.

Under these circumstances, I have come to the conclusion, reluctantly I confess, that the recovery of the arrears of quit rent is not affected by this statute; that the quit rent being in charge, the third saving in the 1st section of the 48 Geo. 3, c. 47. is applicable, and that therefore I must accede to the application of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, and declare that these yearly quit rents of £1 1*s.* 3½*d.* and 11*s.* 10¼*d.*, mentioned at No. 2 in the schedule of incumbrances in this matter, and the arrears thereof are still recoverable.

Solicitors for the Commissioners of Woods and Forests and Land Revenues: *Messrs. Hallowes & Hamilton.*

Solicitors for the vendor: *Messrs. Stephen Gordon & Son.*

MacCarthy, C.

1891.
Nov. 3.

In re ESTATE OF JAMES M'FARLANE.

In re ESTATE OF JAMES M'FARLANE.

Contracts for sale—Specific performance—Defence of surprise and hardship—Inadequacy of consideration—Decree.

Where certain tenants entered into agreements for the purchase of their holdings, and no further proceedings being taken by the vendor, applied for a decree for the specific performance of the contracts, and the decree was resisted on the grounds of surprise and hardship—

Held, that under the circumstances there could not have been surprise, and that, inasmuch as the hardship complained of resulted directly from the terms of the contracts, the applicants were entitled to a decree.

APPLICATION on behalf of the tenant purchasers for a decree for specific performance of the contracts for sale entered into by them with the vendor.

Mr. Ross, Q.C., for the vendor.

Mr. Henry, for the purchasers.

The facts are set forth in the judgment.

COMMISSIONER MACCARTHY:

Mr. Henry, of counsel for the tenant-purchasers, applies to me for a decree for the specific performance of certain agreements

for sale entered into by the vendor in 1888 and 1889, and subsequently sanctioned by the Land Commission. The application is resisted by Mr. Ross on behalf of the vendor. The grounds of opposition are twofold—surprise and hardship. The surprise arose in this way. At the time that the vendor entered into the agreements in question he was engaged as agent of the Duke of Abercorn in carrying out extensive sales of his Grace's estates in this Court. It was only at a later period that he was able to give sufficient attention to the sale of his own estate, and then he was surprised to discover that his agreements, if carried out, would result in hardship to himself. The hardship complained of is stated to have arisen as follows:—The small property in question is liable to a relatively considerable head rent and to a substantial tithe-rentcharge. The vendor is bound by his contracts to redeem both these outgoings so far as may be necessary to carry out the sales to his tenants. The head landlord asks 25 years' purchase while the sales to the tenants are at 17 years' purchase. Moreover, a part of the property remains unsold, and it would be a hardship if the entire head rent had to be redeemed out of the proceeds of the sales of part of the property. Fortunately, however, the vendor is not subject to all the disadvantages he supposes. A head-rent is, of course, more valuable than an ordinary agricultural rent, but the head landlord is not able to secure any price he demands. The redemption price may, at the option of the parties, be fixed by arbitration or by the Court. Neither is it necessary for the vendor to redeem the whole head-rent out of the proceeds of the sale of part of the property. The head-rent can be apportioned, and only the apportioned part need be redeemed. The tithe rent-charge can also be apportioned, and redemption is necessary only in respect of the lands actually sold. These are matters of daily practice in this Court. It is strange that they appear to have been unknown to the vendor and his solicitor, as would appear by the affidavit filed in resistance to the present motion. Nevertheless, I have no reason to doubt the vendor's statement that he entered into these contracts when his mind was pre-occupied, and that he would now like to get out of them or to induce the purchasers to increase their offers. But is this sufficient reason for refusing a decree for specific performance?

MacCarthy, C.

1881. Nov. 3.

In re ESTATE OF JAMES M'FARLANE.

Mr. Ross referred me to the case of *Lamare* v. *Dixon* (1), in which admittedly valid contracts were set aside on account of circumstances outside the contracts themselves and not resulting from their terms. But I find nothing similar in the case before me. There is nothing in it which all concerned did not know before the contracts were entered into, or which does not directly result from these contracts in their plain and ordinary signification. Mr. Ross also referred me to the case of *Falcke* v. *Gray* (2), in which an opinion was expressed by Kinderley, V.C., that a contract might be set aside for mere inadequacy of price. But this was rather an *obiter dictum* than a decision; and Mr. Justice Fry, in his well-known treatise, says that it is opposed to recent current authorities (3). Decrees for specific performance have been refused on the ground of surprise: *Stanley* v. *Robinson* (4). But in the present case I fail to discover what was the surprise. The originating statement, verified by the vendor himself previous to his entering into these contracts, specified this very head rent and this very tithe rentcharge, and stated that it was proposed to redeem them out of the purchase moneys. Decrees have also been refused in cases in which there was evidence of distress in the party against whom performance was sought: *Kerneys* v. *Hansard* (5); or in which he was an illiterate person acting without advice: *Helshan* v. *Langley* (6). But in the present case the vendor is a gentleman of affluence, of high intelligence, and of exceptionally extensive experience in negotiating sales under the Purchase Acts, and he was assisted in this transaction by one of the most eminent solicitors in the North of Ireland, who prepared all the contracts and conducted all the proceedings. On the whole, I see no sufficient reason for refusing to Mr. Henry the relief which he asks. I, therefore, by virtue of the jurisdiction vested in me under the 22nd section of the Land Law (Ireland) Act. 1887, hereby decree the specific performance of the agreements in question, and I give the purchasers their costs of this motion.

Solicitor for the vendor: *Mr. William Wilson.*

Solicitor for the purchasers: *Mr. Patrick Gallagher.*

(1) L. R. 6, H. L. 414.
(2) 4 Drew, 660.
(3) Fry on Specific Performance, Ed. 1881, p. 194.
(4) 1 R. & M., 527.
(5) Coop, 125.
(6) 1 Y. & C., cc. 175.

RICHARD LANE WARREN, Lessor.
JOSEPH RICHARDSON, Lessee.

MacCarthy, C.

1891.
22 Dec.

WARREN, LESSOR; RICHARDSON, LESSEE.

22 *Dec.*, 1891.—*Redemption of Rent (Ireland) Act*, 1891—*Under what circumstances is a lessee entitled to redeem—Bonâ fide occupation—Full agricultural rent—Redemption price—Adequacy of security.*

To be entitled to redeem under the Redemption of Rent (Ireland) Act, 1891, a lessee must be in *bona fide* occupation of an agricultural holding, under a lease to which secs. 1 and 3 of the Land Law (Ireland) Act, 1887, do not apply, and must hold at a rent which the Land Commission, having regard to the circumstances of the case, holding, and district, considers to be a "full agricultural rent."

Where a lessor, on the application of the lessee, consents to the redemption of such rent, but no agreement is arrived at as to the redemption price, the Court has power, on the application of either party, to determine such redemption price. In so determining the Court must have regard to the adequacy of the security for the necessary advance.

APPLICATION on behalf of Joseph Richardson, of Ashgrove, Cork, for an order for the redemption of a rent of £150 created by a lease, dated the 3rd day of June, 1871, from Richard Lane Warren to Thomas Browning and Edwin Browning, of parts of the lands of Gortagoulane, otherwise Ashgrove and Dougheloyne, containing together 96a. 2r. 32p., situate in the Barony of Cork and County of Cork, for the several terms of 991 years and 160 years from the 25th day of March, 1871.

Mr. H. D. Connor, for the lessor.
Mr. Daniel Mahony, for the lessee.

The facts of the case are stated in the judgment.

COMMISSIONER MACCARTHY:

As this is the first case which has been tried under the Redemption of Rent (Ireland) Act, 1891, and the questions which arise are *res nova*, I think it fair to both parties to give judgment formally. The holding is about three miles south of Cork, the area 96a. 2r. 32p., the rent £150, and the Poor Law valuation £103. For several years previous to 1871 it was in the occupancy of Mr. Warren, the present lessor, who expended £1,500 on buildings and other improvements. In 1871 Mr. Warren demised it to two gentlemen named Browning, for long terms of years, at a rent of £180. The lease contained reservations of

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WARREN, LESSOR; RICHARDSON, LESSEE.

timber and game, a clause against alienation, and a covenant to keep the buildings insured for £1,600. In 1876 the Brownings, by a further payment of £600, reduced the rent to £150, and got the reservation of timber waived and the covenant against alienation released. In 1883 the present applicant paid £750 for an assignment of the lessee's interest. In 1886 the dwelling-house was burned down, and about £1,000 was paid by an Insurance Company. This sum was not applied towards rebuilding, as provided by the lease. It was appropriated between lessor and lessee, by mutual consent, in nearly equal shares, to the detriment of the holding. The lessee was amongst the first to take advantage of the Redemption of Rent Act, having filed his originating notice within a few weeks after the Act had passed. The lessor filed his consent to the redemption in due course. This consent, in the prescribed form, is conditional on the lessee being entitled to redeem under the provisions of the Redemption of Rent Act. The first of these provisions is that the tenant must be in *bonâ fide* occupation of an agricultural holding. This was admitted. The second provision is that the holding should be one to which section 1 and section 3 of the Land Law (Ireland) Act, 1887, do not apply. This was proved. The third provision is that the tenant should hold his land at a rent which the Land Commission considers to be a full agricultural rent. The lessor disputed this, and his valuer testified that a full agricultural rent would amount to £177. The Chief Inspector, however, estimates the full letting value of the holding, as it stands, at £125. Relying on his report I decide that the rent is a full agricultural rent. The crucial question of redemption price remains to be decided. On this question we have the usual conflict of valuations. Mr. Aitchison, for the lessee, swears it to be £2,000. Mr. Joyce, for the lessor, denies this, but does not specify his estimate. The landlord claims £3,000. In exercising an absolutely novel jurisdiction in unprecedented legislation I am bound to stick closely to the statute. The statute seems to me to point to the obvious difference between a "head-rent" redeemable under the provisions of the Land Law (Ireland) Act, 1887, and a "full agricultural rent" redeemable under this Act. The methods of redemption are similar, but the things and their values are different. A "head-rent" is scarcely touched by

the recent depreciation in land values in these islands. A "full agricultural rent" is unfortunately subject to the risks attendant on such depreciation. The redemption price that would be right in respect to a well-secured "head-rent" redeemed under the Land Law (Ireland) Act, 1887, would be excessive in respect to a "full agricultural rent," which is the subject matter of this statute. Moreover, the statute directs that in determining the payment to be made for redemption under the Act the Land Commission is to have "regard to the adequacy of the security." This is a peremptory limitation which cannot be disregarded. In the present case part of the suggested security consists of buildings. The principal building has been burned down, and the landlord has received £500 in respect to it. The remaining buildings are reported to me as unsuitable and in process of deterioration. In these circumstances the inspector reports that no advance in excess of £2,200 would be adequately secured. I do not see any reason to differ from this opinion. Having regard, then, to all the circumstances of the case, the holding, and the district, I order that the rent in question be redeemed by the payment of a capital sum of £2,200; and I sanction the advance of this sum for the purpose of such redemption subject to compliance with the Rules of the Land Commission under the Purchase of Land Acts.

Solicitors for the lessor: *Messrs. Exham & Son* and *Justin MacCarthy.*

Solicitor for the lessee: *Mr. John Stanton.*

Bewley, J.

1892.
16 Jan.

In re ESTATE OF P. WALSH.

In re ESTATE OF PATRICK WALSH.

Agreement for sale—Advance sanctioned—Death of vendor before completion of sale—Will—Conversion—44 & 45 Vic., c. 41, sec. 4, sub-sec. 1—Personal representative—Receipt for purchase money.

Patrick Walsh being entitled, under a settlement, to the lands of Jossestown as tenant for life, and in the events which happened with remainder in fee-simple to himself, subject to a jointure of £30 a year or £400 in lieu thereof to Mary Walsh, his wife, in case she survived him, entered into an agreement for sale to the tenant of the said lands. The advance applied for in the agreement was sanctioned by the Land Commission, but the vendor died before the sale was completed.

By his will, executed previous to the contract for sale, he devised the said lands to Mary Walsh, his wife, for life, with remainder to Thomas Walsh, his brother, or his children, nominating two executors, and appointing his wife residuary legatee.

One of the executors having renounced and the other failing to appear, letters of administration of the personal estate, with the will annexed, were granted to Mary Walsh.

On a question as to the power of Mary Walsh, as personal representative of Patrick Walsh, to complete the said contract for sale—

Held, that in her capacity of administratrix of Patrick Walsh, and in her own right as entitled under said settlement to annuity or principal sum in lieu, Mary Walsh could convey the fee simple of the lands, discharged from all estates and interests under the said settlement, and give a valid receipt for the purchase money, and that she was entitled to £400 in priority to any claims under the will of the testator against the proceeds of the sale.

APPLICATION on behalf of Mary Walsh, personal representative of Patrick Walsh, deceased, to have the following questions of law, as stated on a requisition filed the 19th of November, 1891, determined by the Judicial Commissioner:—Whether, having regard to the provisions of the marriage settlement of the 15th of February, 1854, the will of Patrick Walsh, dated the 10th of May, 1886, and the facts as stated on the abstract of title—(1) Can Mary Anne Walsh, as personal representative of Patrick Walsh, complete the contract for sale under the provisions of sec. 4, sub-s. 1, of the Conveyancing and Law of Property Act, and has she power to give a receipt for the purchase money? (2) Ought the contract be carried out under the provisions of sec. 31, sub-s. 2, of the Settled Land Act, 1882, and to whom ought the purchase money be paid? (3) Is Mary Anne Walsh entitled to the sum of £400

mentioned in the said settlement of the 15th of February, 1854, under the provisions thereof?

Mr. H. Wilson, for Mary Walsh.
Mr. Moloney, for Thomas Walsh.

BEWLEY, J.:

In this case a question has been raised as to the power of Mary Anne Walsh, as personal representative of the late Patrick Walsh (the vendor in this matter) or otherwise, to complete the contract for sale entered into by Patrick Walsh with James M'Carthy on the 22nd January, 1890.

Under the settlement dated the 5th February, 1854, executed on the marriage of Patrick Walsh with Mary Anne Walsh (then Mary Anne O'Donnell), Patrick Walsh, in the events which happened of there being no issue of the marriage, was tenant for life of part of the lands of Jossestown, in the Barony of Middlethird, and County of Tipperary, with an immediate remainder in fee-simple to himself in the same lands, subject to a contingent jointure rent-charge of £30 per annum to his wife during her life, in the event of her surviving him, or at her election to a principal sum of £400 in satisfaction thereof.

Being so entitled, Patrick Walsh, on the 16th July, 1889, filed an originating statement in the Land Commission, under the Land Purchase Acts, with the object of selling the lands of Jossestown, comprised in the settlement, to the occupying tenants.

On the 22nd January, 1890, an agreement was entered into between Patrick Walsh and James M'Carthy, a tenant (as I assume, of portion of the lands I have already referred to), for the sale to him of his holding at the price of £440, provided the Land Commission should advance that sum.

The agreement, which was in the ordinary form then in use, provided that in case the Land Commission should advance the sum of £440 to the tenant for the purchase of his holding the landlord would sell and the tenant would purchase the same.

On the 30th April, 1890, an order was made by Mr. Commissioner MacCarthy that, subject to the requirements of the statutes and general rules applicable to the case being complied

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with, and to a guarantee deposit of £88 being provided, £440 should be advanced to the tenant for the purchase of his holding. Upon this order having been made, the tenant, under the 22nd section of the Land Law (Ireland) Act, 1887, was in a position to enforce specific performance of the agreement for sale in case the landlord failed to carry it out.

On the 7th June, 1890, Patrick Walsh died, having made his will, dated the 10th May, 1886, whereby he nominated James O'Donnell and James Walsh his executors, and appointed his wife, Mary Anne Walsh, his residuary legatee.

James O'Donnell renounced probate of the will, and James Walsh having been duly cited and not having appeared, letters of administration of the personal estate and effects of the deceased, with the said will annexed, were duly granted by the Probate and Matrimonial Division of the High Court of Justice to Mary Anne Walsh, the residuary legatee, on the 14th November, 1890.

By this will, which was made long prior to the proceedings taken by the testator under the Land Purchase Acts, the testator had devised his fee-simple property at Jossestown to his wife for life, with remainder to his brother Thomas or his children; but as there was a binding contract for sale of the lands in question at the date of the testator's death capable of being specifically enforced, the interest of the testator in the property as between his real and personal representatives would, when the advance was made by the Land Commission, form part of his personal estate (see *Attorney-General* v. *Day*, (1), *Weedy* v. *Weedy* (2). Under these circumstances the personal representative of Patrick Walsh, pursuant to section 4, sub-sec. 1, of the Conveyancing and Law of Property Act, 1881, is empowered to convey the lands to the purchaser for all the estate and interest vested in Patrick Walsh at his death, and consequently Mary Anne Walsh, in her capacity of administratrix of the deceased, and in her own right as entitled under the settlement to the rent-charge of £30 per annum or to a sum of £400 as its equivalent, can convey the fee-simple of the lands discharged from all estates and interests arising under the settlement, and can give a valid discharge for the purchase money.

(1) 1 Ves., 220. (2) 1 J. & H., 424.

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In answer to the questions submitted to me I shall declare—

1. That Mary Anne Walsh, as administratrix of Patrick Walsh, deceased, and in her own right as entitled under the settlement to the rent-charge of £30 per annum during her life or to £400 in satisfaction thereof, can complete the contract for sale in this case and give a valid receipt for the purchase money.

2. That Mary Anne Walsh, under the settlement of the 5th February, 1854, is entitled to a sum of £400 in priority to any claims under the will of the testator against the proceeds of the sale of the lands.

Solicitors for applicant: *Messrs. George D. Futtrell & Son.*

In re ESTATE OF DANIEL MEARES MAUNSELL.

Holmes, J.

1892.
3 Feb.

In re ESTATE OF DANIEL M. MAUNSELL.

Land Law (Ireland) Act, 1887, *sec.* 15, *sub-sec.* 3—*Tithe rent-charge payable to the Land Commission—Lease of tithes—Redemption—Consent of Treasury.*

By lease made in 1833 certain rectorial tithes and glebes were demised for a term of 104 years and 6 months, subject to a rent of £300.

This rent, and also the reversion in the tithes on the determination of the lease, became vested in the Irish Land Commission.

Portion of the tithes became represented by a tithe rent-charge paid to John Christopher Delmege (in whom the interest of the lessee vested) in respect of the lands for sale in this matter:

Held, that the tithe rent-charge was "payable to the Irish Land Commission" within the meaning of sec. 15, sub-sec. 3, Land Law (Ireland) Act, 1887.

APPLICATION on behalf of the vendor to have the following question of law, as stated on a requisition filed 21st January, 1892, determined by the Judicial Commission:—"Whether the annual rectorial tithe rent-charge of £16 18*s.* 4*d.*, payable by the vendor to the receiver appointed over the life estate of John Christopher Delmege, out of the lands of Gortnacreha Lower, in the Parish of Cloncagh, Barony of Connello Upper, and County of Limerick, which have been sold in this matter, is a 'tithe rent-charge payable to the Land Commission' within the meaning of sub-sections 2 and 3 of section 15 of the Land Law (Ireland) Act, 1887."

The facts as stated on the requisition are as follows:—

By an indenture of lease, dated the 13th day of December,

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1833, made between the Vicars Choral of St. Mary's, Limerick, of the one part, and Christopher Delmege of the other part, the rectorial tithes, great and small, and glebes in the Parish of Cloncagh, Barony of Connello Upper, and County of Limerick, in the Diocese of Limerick, were (*inter alia*) demised by the said Vicars Choral to Christopher Delmege for a term of 104 years and 6 months, from the 29th day of September, 1833, at the yearly rent of £300, payable half-yearly by the said Christopher Delmege to the said Vicars Choral.

The rent of £300 became payable to the Irish Land Commission, and also the reversion in tithes expectant on the determination of said indenture of lease became vested in the Irish Land Commission.

The estate and interest of Christopher Delmege, under the said indenture of lease, became vested in John Christopher Delmege, of Castle Park, Limerick (as tenant for life).

A petition for sale of the life estate of the said John Christopher Delmege in (amongst others) the said rectorial tithe rent-charges, demised by said indenture of lease, was presented to the Land Judge, Chancery Division of the High Court of Justice in Ireland, by the Scottish Union and National Assurance Company, and an absolute order for sale was made in that matter on the 23rd day of June, 1885.

By an order of the Land Judge made in said matter on the 15th February, 1886, a receiver was appointed over the said life estate of the said John Christopher Delmege in the said tithes.

The rectorial tithe rent-charge of £16 18*s.* 4*d.* (being a portion of the tithes demised by said lease) was paid by the vendor in respect of the said lands of Gortnacreha Lower, in the said Parish of Cloncagh, Barony of Connello Upper, and County of Limerick, which were sold to the tenants under the Land Purchase Acts. By an order of the Land Judge made in the said matter of the estate of John Christopher Delmege, owner, the Scottish Union and National Assurance Company, petitioners, dated 20th Nov., 1891, liberty was given to the vendor to apply to this Court to redeem the said rectorial tithe rent-charge of £16 18*s.* 4*d.*, and to fix the redemption price thereof.

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The question of law came before Mr. Justice Holmes, sitting as additional Judicial Commissioner, on the 1st of February, 1892.

Mr. Robertson appeared for the vendor.

Holmes, J.:—

By lease dated 13th December, 1833, the Vicars Choral of St. Mary's, Limerick, devised to Christopher Delmege the rectorial tithes and glebes in the Parish of Cloncagh, and Diocese of Limerick, for the term of 104 years and 6 months, at the yearly rent of £300.

Portion of the rectorial tithes so demised is now represented by a tithe rent-charge of £16 18*s.* 4*d.*, payable out of the lands of Gortnacreha Lower, in County Limerick; and the question for my decision is whether this tithe rent-charge is payable to the Land Commission within the meaning of the Land Law (Ireland) Act, 1887, section 15, sub-section 3. The preceding sub-section enacts that the Land Commission may, if they think it expedient, order the redemption of any tithe rent-charge at a price to be fixed by them; and sub-section 3 adds the proviso that no such redemption of tithe rent-charge payable to the Land Commission shall be made without the previous consent of the Commissioners of the Treasury.

Up to the time when the Irish Church Act, 1869, came into force, tithes and the rent-charge that took their place were of two kinds—tithes belonging to or appropriated to the use of some ecclesiastical corporation, sole or aggregate, and tithes which having been originally dedicated to ecclesiastical purposes had been alienated therefrom, and which were held and enjoyed by their owners like other private property.

All the first-mentioned class of tithes, or rather the tithe rent-charges that had taken their place, were by the Irish Church Act vested in the Commissioners of Church Temporalities, subject to existing tenancies and leases; and upon that body ceasing to exist they passed to the Land Commission. When we found that the 15th section of the Act of 1887, after empowering the Land Commission, at their own discretion, to order the redemption and fix the price of all tithe rent-charges not payable to themselves, provides that where the tithe rent-charges are so payable the consent

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of the Commissioners of the Treasury is necessary before the redemption can be effected, the natural and only intelligible reason for the distinction is that a public department ought not to be allowed to deal with property in which it has itself an important interest without some external authority to guide and control it. This reason would be as applicable where the Land Commission are owners of the tithe rent-charge subject to a terminable lease as to where they are entitled to it free from any tenancy—otherwise there would be the absurd consequence that the Land Commission would have uncontrolled power to order the redemption of a tithe rent-charge that had been demised for a term of years of which only six months remained to run, while at the termination of the six months it could only do so with the consent of the Treasury. Mr. Robertson, however, argues that this consequence, absurd as it seems to be, is the effect of the language of the provision. He contends that it is impossible to hold that, as the tithe rent-charge in this matter is now payable to Mr. Delmege, it can come within the description of being payable to the Land Commission. I am of opinion that the word "payable" in this section cannot be limited in the way in which it would be necessary to limit it if Mr. Robertson's argument is to prevail. It cannot mean payable as to particular gales. It applies to the rent-charge generally as it becomes due from time to time. What is redeemed is a tithe rent-charge payable to Mr. Delmege during the term, and to the Land Commission when the term expires. I am of opinion that a natural, and indeed the only possible, construction is to read "payable to" as equivalent to "belonging to" or "owned by," and there can be no doubt that the Land Commission are the owners subject to the lease. I therefore hold that the tithe rent-charge in question is payable to the Land Commission within the meaning of section 15, sub-section 3, of the Act of 1887, and I declare accordingly.

Having come to this conclusion, it is unnecessary for me to direct any notice to be served on the Treasury, which I should have done before deciding the matter if I had been disposed to take a different view.

Solicitors for the Vendors: *Messrs. Maunsell and Son.*
Solicitor for J. C. Delmege: *Mr. H. B. Burton.*

In re ESTATE OF CATHERINE WADDELL BOYD SYNGE.

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Annuity charged on lands—Consent to and order for redemption—Determination of annuity before completion of contract—Claim by executors of annuitant to redemption money—Contracts for sale of determinable interests.

A, the vendor, being tenant for life of certain lands subject to an annuity of £24 to B for his life, entered into agreements, under the Purchase of Land Acts, for sale to the tenants thereof.

By a consent between the vendor and the annuitant it was agreed that, "as soon as advances to a sufficient amount in respect of the sales of the lands shall have been made in the matter, the annuity of £24 . . . charged and payable out of the lands, parts of which have been sold in this matter, be redeemed, and the redemption price . . . be and the same is hereby fixed at the sum of £225 7*s*."

On the 13th of January, 1891, this consent was made a rule of Court, and it was ordered that the annuity be redeemed accordingly. The final schedule of incumbrances was lodged, returning the redemption money as an incumbrance. The schedule was ruled on the 26th of May, 1891, and this claim was allowed.

Two days after the ruling of the schedule, but before the making of any of the advances the annuitant died. His will was proved in England by his executors, and was resealed in Ireland on the 21st of August, 1891.

The advances were made on the 27th of June, 1891. Upon the above facts the executors of the annuitant claimed to be entitled to the redemption price.

Held—Upon its true construction the consent order was not conditional upon the annuity continuing up to the time of completion, but contemplated an absolute redemption of the annuity, to be carried out by payment when sufficient funds were in Court for that purpose, and that the executors of the annuitant were entitled to be paid the redemption price.

The principle of equity in ordinary contracts applies to contracts for the sale of terminable interests—viz., that a binding contract to be completed immediately or at a future period transfers in equity the ownership. Up to the time of completion the vendor receives the profits, but the substantial property rests in the purchaser. If the property is destroyed or ceases to exist the loss falls on the purchaser.

UPON the allocation of the schedule of incumbrances in this matter, on the claim of Robert Follett Synge and William Makepeace Thackeray Synge, executors of the will of William Webb Follett Synge, deceased, to a sum of £225 7*s*., being the redemption price of an annuity of £24 formerly payable in respect of the lands sold therein, the following case stating a question of law was submitted by the Commissioner for the determination of

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the Judicial Commissioner, pursuant to sec. 28, sub-sec. (8) of the Purchase of Land (Ireland) Act, 1891:—

1. Under the will, dated the 20th day of July, 1858, of Robert Follett Synge, deceased, the vendor in this matter became, and at the date of the consent hereinafter mentioned was, entitled, as tenant for her own life, to the lands described in the first schedule to the originating statement lodged in this matter on the 20th day of November, 1890, subject, *inter alia*, to an annuity of £24 a year charged thereon by the will dated 31st January, 1854, of Francis H. Synge, deceased, payable thereout to William Webb Follett Synge during his life. Francis Julian Synge, Ledley Browne, and Henry Robert Tweedy are trustees, for the purpose of the Settled Land Acts, of the will of the said Robert Follett Synge.

2. It was proposed by the said originating statement, and provided by the agreements for sale entered into between the vendor and the tenants upon the said lands, that the sales should be carried out by means of vesting orders.

3. The said vendor and William Follett Synge signed a consent for the redemption of the said annuity, dated the 9th December, 1890, in the words following:—"It is hereby consented by and between the above-named owner, on the one hand, and William Webb Follett Synge, on the other hand, testified by their respective signatures hereto, that as soon as advances to a sufficient amount in respect of the sales of the lands hereinafter mentioned, or any of them, shall have been made in this matter, the annuity or yearly rent-charge of £24 (created by the will, dated the 31st day of January, 1854, of Francis Hutchinson Synge, who died on the 24th day of August, 1854), in favour of the said William Webb Follett Synge, in the said will called William Webb Synge, for his life, and thereby charged upon and payable out of the lands of Cloonmore, Derryad, Sharvogue, and Ballyclare, situate in the Barony of Moydow and County of Longford, parts of which have been sold in this matter) be redeemed, and that the redemption price of the said annuity or yearly rent-charge be and the same is hereby fixed at the sum of £225 7*s.*, and that this consent be received and made a rule or order of the Court of the Irish Land Commission."

4. By order dated the 13th January, 1891, the said consent was made a rule of Court as between the parties thereto, and accordingly it was ordered by the Court that as soon as any of the advances in respect of sales thereinafter mentioned should have been made, the annuity or yearly rent-charge of £24, by the said will charged upon and payable out of the lands of Cloonmore, Sharvogue, Derryad, and Ballyclare, situate in the Barony of Moydow and County of Longford, parts of which had been sold in this matter, be redeemed at the price or sum of £225 7*s.*

5. The final schedule of incumbrances in this matter was lodged on the 7th day of April, 1891, and the sum of £225 7*s.* as the redemption price for the said annuity or rent-charge, was thereon returned as Incumbrance No. 6.

6. On the 26th May, 1891, before the making of any of the advances, the matter came before me for the ruling of the schedule of incumbrances: and the claim of the said annuitant for the said sum of £225 7*s.*, being the redemption price of the said annuity fixed by the said consent and order, was allowed by me as against the fund to be provided by the said advances. On the 30th day of May, 1891, the demand was vouched by the Examiner on the affidavit of the said William Webb Follett Synge, filed the 23rd day of May, 1891.

7. On the 28th May, 1891, however, the said annuitant died. This will was proved in London on the 20th of July, 1891, by his executors, and resealed in Ireland on the 21st of August, 1891.

8. The advances in respect of the sales in this matter were made on the 27th of June, 1891, and a fund thereupon became available for distribution; and the said schedule came on before me for allocation on the 2nd day of July, 1891; and being informed that the said William Webb Follett Synge had died, I made an order directing that the sum of £320 19*s.*, being the amount of the redemption money, arrears of annuity, and costs of proof, should be retained in Court to the credit of the matter.

The question of law which I desire to submit for the hearing and determination of the Judicial Commissioner is—Are Robert Follett Synge, Francis Julian Synge, and William Makepeace Thackeray Synge, the executors of the will of the late William

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Webb Follett Synge, upon the facts above stated, entitled to the said sum of £225 7*s.*, the redemption price of the said annuity?

(Signed) JOHN GEORGE MACCARTHY.

21*st January*, 1892.

The case came before Mr. Justice Gibson, sitting as additional Judicial Commissioner, on the 10th of February, 1892.

Mr. Overend, for the vendor.

Mr. Devereux Barton, for the executors of the annuitant.

GIBSON, J.:

The point for decision in this case is whether a consent order for the redemption of an annuity, at a price agreed upon, is upon its true construction conditional upon the annuity continuing up to the time of completion, and whether the death of the annuitant before completion makes the redemption order inoperative. The facts are set out concisely in the case submitted for the opinion of the Court.

The vendor is tenant for life of the lands for sale in this matter, subject to an annuity of £24 to W. W. F. Synge for his life.

There are trustees for sale of the settled estate for the purpose of the Settled Land Acts. By consent, dated 9th December, 1890, and made between the vendor, described as owner, and the said annuitant, it was agreed that, "as soon as advances to a sufficient amount in respect of the sales of the lands or any of them (therein described) shall have been made in this matter, the annuity or yearly rent-charge of £24 created by the will (therein mentioned), and thereby charged upon and payable out of the lands (therein described), parts of which have been sold in this matter, be redeemed, and that the redemption price of the said annuity or yearly rent-charge be and the same is hereby fixed at the sum of £225 7*s.*" The consent was duly made a rule of Court on the 13th January, 1891. The final schedule was lodged, returning the said redemption money as Incumbrance No. 6, and the same was duly ruled and the claim of the annuitant in respect thereof allowed on May 26th, 1891. The advances in respect of

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the sales in the matter were made on June 27th, 1891, and a fund thereupon became available for distribution. The annuitant died on the 28th May, 1891.

On these facts it is argued on behalf of the owner that the annuity having determined before the 27th June, the redemption contemplated by the consent order cannot take place, while on behalf of the executors of the annuitant it is contended that the property in the annuity passed by the contract, and that the loss falls on the estate. The construction of this particular contract and order may be a matter of some difficulty, but the general law relating to the sale of determinable interests, whether in or out of Court, is clear enough. The ordinary doctrine of equity applies, and the contract vests the ownership in the purchaser, who, no matter how unfavourably the chance bought may turn out, has to submit to the loss.

The principle is the same, whether a life annuity is the price or the subject of the sale. Thus, where there was a contract to sell an estate in consideration of a life annuity to the vendor, the contract was held enforceable though the vendor died within two days after the contract: *Mortimer* v. *Capper* (1). So, in *Vesey* v. *Elwood* (2), the purchaser of an estate, *pur autre vie*, sold under decree, was held to his bargain though the *cestui que vie* died before the Master's report could have been confirmed. The circumstance that the contract is not to be completed till a future time makes no difference in the application of the rule. Where the plaintiff bought certain premises in consideration of a life annuity to the vendor, to commence in future and to be secured by good and sufficient landed security to the satisfaction of vendor's counsel, the purchaser was held entitled to specific performance, notwithstanding the death of the annuitant vendor before the completion: *Jackson* v. *Lever* (3). A case more nearly touching the present is *Kenney* v. *Wexham* (4). The purchase was there made by the owner, on whose estate the annuity was charged, and the transaction was in fact a redemption. The plaintiff was owner of a life annuity for the life of another person issuing out of the defendant's estate, and on the 18th April, 1818, he entered into a written

(1) 1 Brown E. Cases, 156.
(2) 3 Dr. and Warr, 74.
(3) 3 Brown, C. C., 605.
(4) 6 Madd., 355.

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contract with defendant to sell him the annuity for £280, of which a first instalment of £200 was to be paid in October, and the balance on January 1st, 1819. There was no express stipulation as to when the purchaser was to become entitled to the annuity. Sir John Leach, V.C., held that the purchaser was only entitled from the time of the payment of the last instalment. There was some delay on account of a dispute as to this point, and in October the purchaser wrote, claiming arrears of annuity from date of contract, and offering to complete.

The life died a few days after this letter.

The case was argued by counsel of great eminence—Mr. Sugden for the plaintiff, Mr. Bell for the defendant. It was assumed throughout that the contract was absolute, and not conditional on the annuity continuing.

The point principally discussed was whether specific performance could be decreed after the subject of the contract was gone, and whether the plaintiff's remedy was not at law. In the present case no such difficulty can arise, as we are dealing with an order of Court made by the tribunal, which has under its control funds to carry out its order.

Whether rightly or wrongly, Sir John Leach held that the suit for specific performance could be maintained on the ground that the purchaser had an equitable title to the arrears from the date of the contract to the death. The present doctrine is, that up to the time fixed for completion the profits, &c., of the estate sold go to the vendor. But the Vice-Chancellor distinctly held that the time for completion was future, and that the contract was effectual notwithstanding that the annuity had determined before the time for completion had arrived. The report does not state that any of the purchase money had been paid. The case is quoted with approval by Lord St. Leonards in the last edition of "Vendors and Purchasers."

These decisions show that the principle of equity in ordinary contracts of sale applies to contracts for the sale of terminable interests—viz., that a binding contract to be completed immediately or at a future period, tranfers in equity the ownership. Up to the period fixed for completion the vendor receives the profits, but the substantial property is in the purchaser, and if the

property is destroyed or ceases to exist, the loss is his, *res perit domino suo*. The determination of an annuity after sale and before completion is a risk undertaken by the purchaser, though the vendor also loses in part, so far as he is entitled to receive the annuity, while it lasts, up to completion. In the present case had the contract been that the annuitant would sell and convey the annuity to the owner six months hence for the price of £225, I have no doubt that the death of the annuitant would not have nullified the contract any more than the determination of a life-estate, or the destruction of the property sold by fire or flood before completion, would invalidate an ordinary contract of sale.

The precise point now in controversy is this—do the contract and order contemplate redemption as absolutely settled at a fixed price, with time of completion only deferred? Or do they point to redemption in future of an annuity, the continued existence of which is an essential condition to the order?

After attentive consideration of the perplexing and ambiguous phraseology of the contract—the order is really a contract—I am of opinion that it should be construed in the same way as a contract for the sale of the annuity to the owner of the estate would be construed if couched in the same language.

The estate is quite solvent, and the postponement of the carrying out of redemption till sufficient funds are advanced, refers to the circumstances and convenience of the estate, and not to any contingency of the funds not being sufficient. In the Landed Estates Court in case of solvent estates, and also in Courts of Equity, it is sometimes consented that the estate shall be sold discharged from an annuity, and that the annuity shall be commuted at a fixed sum. In such an event the price is not paid until after sale and allocation, but the contract is absolute and not contingent. It is certain the payment will be made, the only uncertainty is as to the time.

Again, though there may be jurisdiction under the Land Law (Ireland) Act, 1887, to direct a prospective contingent redemption, it is manifest that what Section 16 immediately contemplates is an absolute redemption, then and there ascertaining the rights of the parties, even though the completion may be deferred. The order here directs that the annuity be redeemed

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(not shall be redeemed) on sufficient funds coming into Court. The redemption is not treated as necessarily future, though its completion is prospective. Furthermore, the price for redemption is fixed at the date of the contract, upon the then value of the life, and if the seller has to face the risk of the contract falling through by death before completion, that is a matter that might have to be considered in settling the price, and of which the seller ought to have distinct notice by clear language in his contract. In the present case the age of the annuitant and his state of health are not stated, probably because no evidence was offered on the subject.

The risk of death before completion is obviously one-sided, as the price being fixed once for all, the annuitant cannot gain, but the purchaser may. The ordinary and recognised form of contract in case of judicial sales is absolute, and not conditional on future events, with which the party dealing with the Court has no connection; and where phraseology is ambiguous, the Court should adopt the construction most in harmony with its principles and practice. There are other considerations founded on expediency which tend in the same direction. A person who, by consenting to be redeemed, facilitates a sale certainly stands in no worse position than an ordinary purchaser from the Court, and if it is intended by a novel form of contract to make the redemption depend on the annuitant being alive at some future definite (or as here), indefinite time, that intention and contingency should be clearly and distinctly stated. In the present case Mr. Overend frankly admitted that on first perusing the contract he thought it was clearly within the general rule, and that it was only after study that he was led to the conditional construction.

There is another argument based on expediency that occurs to me as of some weight. The Court should avoid, not merely any ground, but any pretext for cavil or complaint. Litigants are too prone (often without a particle of reason) to complain of the delay and procrastination of law. If a party redeeming finds that the right to the redemption money depends on the future action of the Court in making advances, and he loses the benefit of his contract by reason of death before the advances are made, he is likely to cherish a fancied grievance, which might be a real one

if the advances had been delayed in fact, even though such delay was caused by unavoidable circumstances, such as illness or accident befalling the Land Commissioners or the officers of their staff. From the point of view of the Court I think it would be better to adhere to the established form of contract in judicial sales, and eliminate contingencies, particularly contingencies depending on the action of the Court, its celerity or delay.

From another standpoint also it may be convenient to adopt absolute contracts. Were the redemption of an annuity to depend on its being in existence at some future time, it would be quite possible, if after the contract the annuitant fell into bad health, that the owner might interpose obstacles and delay which might have the effect of making the contract abortive. It may be said that this is a remote speculation, but it might occur. In life it is the unforeseen that happens. In the case of a large annuity redeemed for a considerable sum, it is easy to see what an unpleasant and envenomed controversy might arise if the annuitant became ill and died before completion. It is inconvenient that the right of one of the parties should depend on a future event over which he has no control, but which may be largely affected by the other party, the owner having carriage. Where, however, the contract is absolute, though completion is deferred, it is always the interest of the party redeeming to press forward proceedings in order to stop the annuity running and to get the benefit of the purchase.

In my opinion, the transaction contemplated by the consent and order following it was an absolute redemption of the annuity to be carried out by payment in cash when sufficient funds were in Court, and the risk of the chance turning out unfavourable was thrown on the estate. As the contract is said to be in a form commonly used in Land Commission proceedings, I have gone into the question at some length.

The executors of the annuitant are entitled to be paid the price agreed upon, and the question in the case must be answered in the affirmative.

The executors should have their costs of and incident to the discussion and decision of the point raised.

Order accordingly.

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ESTATE OF WILLIAM THOMAS TRENCH AND ANOTHER.

Settlement—Trust funds—Sole Trustee—Receipt clause—44 & 45 *Vic*, *c.* 41, *sec.* 36; 45 & 46 *Vic.*, *c.* 38, *secs.* 39 *and* 40.

Where trust funds comprised in a settlement executed previous to the Settled Land Act, 1882, were vested expressly in a sole trustee, and the settlement contained a power of sale and exchange by the trustee, but no receipt clause, the Court refused payment of part of the capital trust funds to the sole trustee.

APPLICATION on behalf of Captain O'Connor Henchy and Charles Granby Burke for an order that the sum of £3,337 12*s.* 9*d.*, Government £2¾ per cent. Consolidated Stock, standing to the credit of this matter (being the redemption price of a certain fee-farm rent of £138 9*s.* 3*d.*, payable out of the lands sold in this matter), be transferred to Charles Granby Burke as sole trustee of an Indenture of Settlement dated the 9th July, 1873.

Mr. Richards, for Captain Hugh O'Connor Henchy and Charles Granby Burke.

The facts are set forth in the judgment.

COMMISSIONER MACCARTHY:—

In this case Mr. Richards, of counsel for Hugh O'Connor Henchy and Charles Granby Burke, raises a question of practice the decision of which involves the allocation of a substantial sum of money, and, if such decision should become a precedent, the dealings with the very considerable amount of trust funds which stand in the name of single trustees, under settlements executed before the Settled Land Act, 1882.

The facts, so far as they affect the question at issue, are as follows:—

By settlement dated 9th July, 1873, a fee-farm rent of £138 9*s.* 3*d.* was conveyed (*inter alia*) to Charles Granby Burke, as sole trustee, to hold (after a life estate therein now determined) to the use of Hugh O'Connor Henchy for life, with remainders over, and with power to Hugh O'Connor Henchy to charge all the property in settlement with a jointure of £600 for

his wife on his marriage and with fortunes for younger children. The settlement gives the trustee a power of sale and exchange, with the consent of the tenant, for life; but it does not contain any express clause authorising him to give receipts for the capital trust money or any part of it.

By a sub-settlement dated 30th August, 1887, and made on his marriage, Captain Hugh O'Connor Henchy appointed a jointure of £600 a year for his intended wife, charged the land with portions for younger children, and appointed Messrs. George Morris and Llewelyn Blake trustees to secure the jointure and portions.

On the 23rd June, 1891, I ordered the fee-farm rent of £138 9*s.* 3*d.* to be redeemed for £3,200. This sum, as represented by £3,337 12*s.* 9*d.* Consols, is the subject-matter of the present motion.

Mr. Richards applies to me on behalf of the sole trustee of the settlement of 9th July, 1873, and also on behalf of the tenant for life as a consenting party, to pay out the redemption price to the trustee.

I directed that the trustees of the sub-settlement of 30th August, 1887, should get notice of this application. They appeared by Mr. Stapleton, who at first objected to payment to one trustee, but subsequently attended to state that he was instructed neither to oppose nor to consent to the proposed payment. No question arises as to the personal respectability and trustworthiness of the existing trustee.

The settled practice of the Court of Chancery, of the Landed Estates Court, and of this Court, has been to refuse payment of trust funds to a single trustee, however trustworthy and respectable. The leading case in support of this practice is *In re Dickson* (1), where Judge Flanagan refused to pay a fund out of Court to a sole trustee, although but one trustee was originally appointed by the settlement.

Mr. Richards distinguishes the present case from *In re Dickson* and claims that his client is entitled to payment on two grounds—(1) that the settlement under which Mr. Burke claims contains a power of sale and investment, while there was no such power

(1) I. R. 3 Eq. 344; 3 Ir. L. T. 573.

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In re ESTATE OF WM. THOS. TRENCH AND ANOTHER.

in the settlement *In re Dickson*; and (2) that since Judge Flanagan's decision was pronounced the law on the subject has been altered by the 36th section of the Conveyancing Act, 1881, and the 39th, 40th, and 45th sections of the Settled Land Act, 1882.

The first distinction does not seem to me important. The question I have to consider is not as to the power of a single trustee to vary investments, but as to the exercise of my discretion by departing from the usual practices of Courts and directing payment of a substantial sum of capital trust money to a sole trustee. The authority chiefly relied upon by Mr. Richards is *In re Orme and Hargreave's Contract* (1). It is stated in Wolstenholme and Turner's text-book that the correctness of this decision has been questioned by a Judge in Chamber (2). At best the case deals only inferentially with the question now at issue, but its pertinency as an authority in this case is impaired by the fact that Vice-Chancellor Bacon, in deciding it, mentioned as his *ratio decidendi* that the settlement gave express power to one trustee to give receipts for capital moneys received by him under the settlement. In the settlement now under consideration there is no such power; and in *Cox* v. *Cox* (3) it was decided that such a power could not be inferred from a power of sale and exchange.

In his second contention Mr. Richards is on more solid ground. The 36th section of the Conveyancing Act, 1881, vests in trustees a statutory power to give receipts for trust funds payable to them, and this power extends to a single trustee and to trusts created before the commencement of that Act. The 40th section of the Settled Land Act, 1882, enacts that where one trustee is empowered to act the receipt of such one is sufficient. The 45th section, sub-section 2, of the same Act, dispenses with notice to two trustees when a contrary intention is expressed in the settlement. The 39th section, which directs that capital moneys arising under that Act shall not be paid to fewer than two trustees unless the settlement authorises the receipt of capital trust money by one trustee, is not retrospective. If, therefore, this were a

(1) 25 Ch. Div. 595.
(2) Conveyancing and Settled Land Acts, 5 Ed. 272.
(3) 1 K. and I. 251; Lewin on Trusts 460.

question of whether a purchaser could object to pay the trustee I would see no sufficient reason for such an objection. But I have to consider a much wider question—namely, whether on grounds of public policy it would be a wise exercise of judicial discretion to direct payment of a large sum of capital trust money to a single trustee, however respectable and trustworthy. This question I feel bound to answer in the negative.

It is evident from the 39th section of the Settled Land Act, 1882, to which I have just referred, that the Legislature intended to discourage payment of capital trust funds to fewer than two persons, unless by express authority in the settlement—an authority which does not exist in this case. The Settled Land Act of 1890 similarly contemplates payment to not less than two trustees. This has continued to be the general practice of the Courts, notwithstanding the discretion conferred by the enactments to which Mr. Richards has called attention. It is a practice founded on grave reasons of public policy and justified by experience. Even as between individuals it is doubtful whether a prudent man should consent to act as sole trustee, or whether trust funds should be left at the disposal of any individual. I have to deal with the matter, however, not as an individual, but as a Court, and I must decline to depart from the safe and reasonable practice sanctioned by the authority of tribunals so much greater and so much older than mine.

I must therefore refuse the present motion, while fully recognising the ability and learning by which it has been supported and the unimpeachable personal character of the trustee in question.

No serious inconvenience can arise from this decision, as I have power to appoint a second trustee on proper application, and by a very simple and inexpensive process.

Solicitors for Captain O'Connor Henchy and Charles G. Burke: *Messrs. S. S. & E. Reeves & Sons.*

Solicitors for George Morris and Llewelyn Blake, trustees of settlement of 30th August, 1887: *Messrs. E. & G. Stapleton.*

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